TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1915

No. [redacted]65

UNION PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

PUBLIC SERVICE COMMISSION OF MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED SEPTEMBER 6, 1916.

(28,000)

(25,596)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 313.

UNION PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

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IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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1 In the Supreme Court of Missouri.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,

vs.

PUBLIC SERVICE COMMISSION OF MISSOURI, Defendant in Error.

Praecipe for Transcript.

The Clerk will please incorporate in the transcript copies of all the proceedings in this Court which constitute the record in this Court together with a copy of the opinion of this Court and a copy of the entire original record or transcript from the Court below except that there may be omitted therefrom the Charter or Certificate of Incorporation and Amendments of the Union Pacific Railroad Company; the statement of financial condition of said company; a copy of the mortgage and a detailed statement of expenditures, being Exhibits A, B, C, and D to the original application for approval of bonds; also, omit copy of the resolution of the Board of Directors authorizing the Union Pacific to issue bonds, and the statement showing list and number of stockholders.

You will please include in such transcript the paragraph in the Charter or Articles of Incorporation covering borrowing of money, and mortgaging of lines, and also, the two extracts from the mortgage, namely: First paragraph of page 19, and all of Section 4, of Article Second of said mortgage.

R. W. BLAIR AND
I. N. WATSON,
Attorney- for Union Pacific Railroad Co.

Service of the within and foregoing is hereby acknowledged this 28th day of September, 1916.

ALEX. Z. PATTERSON,
Attorney, Public Service Commission.

[Endorsed:] Filed Sep. 28, 1915. J. D. Allen, Clerk.

1½ In the Supreme Court of Missouri.

No. 19318.

UNION PACIFIC RAILROAD COMPANY, Respondent,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, Appellant.

Be it remembered, that on February 24th, 1916, there was filed in the office of the Clerk of this Court, an Abstract of the Record

and Proceedings of the Circuit Court of Cole County, Missouri, in a certain appeal wherein the Union Pacific Railroad Company was respondent and the Public Service Commission of the State of Missouri was appellant, which said Abstract of the record is in words and figures as follows:

2 In the Supreme Court of Missouri, Division No. —, April Term, 1916.

No. 19318.

UNION PACIFIC RAILROAD COMPANY, Respondent,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, Appellant.

Appeal from the Circuit Court of Cole County, Missouri.

Appellant's Abstract of the Record.

This action was instituted in the Circuit Court of Cole County, Missouri, by respondent filing in the office of the clerk of said court on November 7, 1914, its petition for certiorari, or writ of review, to review the order of the appellant fixing the fee for the granting of authority for issuance of bonds by respondent, Union Pacific
3 Railroad Company, to the amount of $31,848,900, at the sum of $10,962.25, being an order entered in case No. 490 on the docket of the appellant. Said petition for certiorari, or review, was filed within thirty days after respondent's motion for rehearing was denied by appellant. Said motion for rehearing is, for convenience, set out in the appendix hereto. Said petition, omitting caption and signatures, is as follows:

Petition for Writ of Certiorari or Review.

Plaintiff alleges that it is a corporation organized and existing under the laws of the State of Utah, and owns and operates a line of railroad extending from Kansas City, Missouri, through the states of Kansas and Colorado to Cheyenne, Wyoming, where it connects with another line of railroad owned and operated by the plaintiff which extends from Council Bluffs, Iowa, through the states of Iowa, Nebraska, Wyoming and Utah; that there are 3,560.41 miles of track in said railroad lines, of which only .51 of a mile is located in the State of Missouri and is that part of plaintiff's railroad which extends from the Kansas-Missouri state line to the union depot in Kansas City, Missouri; that the book value of plaintiff's entire railroad property as of June 30, 1914, was $281,057,730.05 and that the estimated value of that part in the State of Missouri as of said date

was $3,658,893.29; that plaintiff was engaged in the transportation of interstate commerce to and from the State of Missouri for many years prior to the enactment of the Public Service Law of Missouri, over the above-described railroad and that all business transacted by it in the State of Missouri consists of the receipt or delivery of
4 traffic originating in said state and destined to other states or that originating in other states destined to Kansas City, Missouri, and constitutes exclusively interstate trade or commerce.

Plaintiff further alleges that on or about the 1st day of June, 1908, it duly executed, with the Equitable Trust Company of New York as trustee, a note or deed of trust to secure an issue of first lien and refunding mortgage four per cent bonds, which mortgage was duly recorded and became a lien, prior to the enactment of the Public Service Commission Law of Missouri, upon its railroad property, including that part in the State of Missouri and the property appurtenant thereto in said state.

Plaintiff further alleges that under the terms of said mortgage $50,000,000.00 of bonds were issued at the time of its execution and that under section 4 of article 2 of said mortgage $50,000,000.00 of additional bonds thereby secured were reserved to be issued to reimburse plaintiff for expenditures made by it after June 1, 1908, for the purposes set forth in said section. That thereafter, and prior to June 30, 1910, in accordance with said section, $15,085,640 of bonds were duly issued.

Plaintiff further alleges that after June 1, 1910, it made expenditures to the amount of $31,848,900 for purposes for which additional bonds may be issued under said section 4 of article 2 of said mortgage, and that said expenditures were made along its entire line of railroad, but that only $124,930.38 thereof were made in the State of Missouri.

Plaintiff further alleges that the Public Service Commission of the State of Missouri, defendant, ever since its creation, has asserted jurisdiction under the Public Service Commission Law to au-
5 thorize or disapprove proposed bond issues by foreign and interstate railroad corporations having any property or doing any business in the State of Missouri and that such assertion of jurisdiction would have constituted a cloud upon the validity and legality of any bonds issued by the plaintiff, and therefore rendered such bonds unmarketable if the plaintiff had not first secured the approval of the Public Service Commission, defendant. That said act provides severe penalties against corporations subject to its provisions, and their officers and agents, for issuing bonds without the approval of the Public Service Commission of Missouri, and that to avoid said cloud upon the validity of said bonds and the possible penalties aforesaid plaintiff was compelled to, and did, make application on September 4, 1914, to the Public Service Commission of Missouri, defendant, for a certificate authorizing it to issue additional bonds to the amount of $31,848,900.00 under the terms of said mortgage; that a hearing was duly had and on September 22, 1914, the defendant duly issued a certificate as prayed, and thereafter the de-

fendant rendered a decision fixing the fees to be charged for such certificate at $10,962.25, which was the rate of $1.00 per $1,000.00 for the first $1,000,000.00, 50 cents per $1,000.00 for the next $9,000,000.00, and 25 cents per $1,000.00 for the remainder. That thereafter the plaintiff duly filed its petition for a rehearing of the decision so fixing the fees, which petition for a rehearing was overruled by the defendant on October 19, 1914.

Plaintiff alleges that the defendant erred in its decision fixing the fees as aforesaid, and in overruling the petition for a rehearing, for the following reasons:

(1) The Public Service Commission Law of Missouri does
6 not confer any jurisdiction on the Public Service Commission in respect to the authorization of bond issues and the fees to be charged therefor where such bond issues are made by corporations organized or existing under the laws of states other than the State of Missouri.

(2) Even if it shall be held that the defendant did have jurisdiction under said law over the plaintiff, the fees charged should have been based upon the amount of the expenditures made in the State of Missouri, namely, $124,938.00.

(3) The Public Service Commission Act as construed by the defendant wherein it decided that the fees should be assessed upon the entire issue of bonds, namely, $31,848,900, is in excess of the powers of the State of Missouri and in conflict with the provisions of the Constitution of the United States and the amendments thereto, in that said act as so construed constitutes a regulation of commerce among the several states and an interference with and burden upon the conduct of interstate business and commerce in which plaintiff is engaged, and constitutes a regulation and taxation of property and rights of plaintiff outside the State of Missouri and deprives plaintiff of its property without due process of law, and denies it the equal protection of the law.

(4) The Public Service Act as construed by defendant whereby it claims jurisdiction to authorize or disapprove the issue of bonds by foreign railroad corporations doing business and having prop-
7 erty in the State of Missouri, is an unlawful interference with and burden upon and regulation of interstate commerce and is a regulation and taxation of property outside of the State of Missouri, in violation of the Constitution of the United States, and deprives plaintiff of its property without due process of law and denies it the equal protection of the law.

Wherefore, plaintiff prays for a writ of certiorari, directing the defendant, the Public Service Commission of the State of Missouri, to certify its record in the proceedings before it to this court, and to stand to and abide by such order and judgment as shall be rendered herein; and plaintiff further prays for judgment setting aside the decision of the defendant fixing the fees as aforesaid, and for costs and for such other and further relief as shall be just and proper.

Upon the filing of said petition, and on said 7th day of November, 1914, a writ of review was issued by the Clerk of said Circuit Court directing appellant to file in said Circuit Court on or before the 7th

day of December, 1914, the petition and record in said cause, with all the proceedings pertaining thereto, on file with appellant. In obedience to said writ of review, appellant duly certified to said Circuit Court of Cole county, Missouri, on or before the return day of said writ, the complete record of appellant in said cause, and the same was thereupon duly filed in said Circuit Court, and became a part of the record thereof.

Trial.

On November 18, 1915, during the November, 1915, term of said Circuit Court of Cole county, Missouri, this cause came on regularly for trial in said court before the Honorable John G. Slate,
8 Judge thereof, without a jury. Appellant and respondent duly appeared by their respective counsel, and said cause was on said date and at said term duly submitted upon the pleadings, and the original transcript of the record, testimony and exhibits of appellant, as aforesaid.

Judgment.

Afterwards on the said 18th day of November, 1915, and during the said November, 1915, term of the said court, the court rendered and caused to be entered its findings and judgment therein, setting aside the order of appellant. Said judgment so entered, omitting caption, is as follows:

This cause coming on for hearing, without the intervention of a jury, on the record, evidence and exhibits introduced before the defendant Public Service Commission of the State of Missouri, and on the order of the said Commission, as certified to and filed in this court by said defendant, and the parties plaintiff and defendant appearing by their respective attorneys, the court being fully advised, and after full consideration, finds and adjudges that the order of the defendant Public Service Commission of the State of Missouri fixing the fee for the issuance of bonds by the plaintiff Union Pacific Railroad Company, amounting to $31,848,900, at the sum of $10,962.25, was and is unreasonable and unlawful, and said order of the defendant is hereby set aside, and the court further finds that the lawful amount of fee that can be charged, and should have been fixed by the defendant for the issuance of such bonds, is the sum of $250.00, which is the minimum fee provided by section 21 of the Public Service Commission Law of Missouri, approved March 17, 1913;
9 and said order of the defendant Commission fixing and assessing said fee at the sum of $10,962.25 is hereby set aside and reversed, and this cause is remanded to the defendant Public Service Commission of the State of Missouri with directions to make and enter an order fixing such fee to be paid by the plaintiff at the said sum of $250.00.

The order of appellant, as set aside by said court, is hereinafter set forth.

Motions for New Trial and in Arrest of Judgment Filed.

Afterwards, to wit, on the said 18th day of November, 1915, and during said November, 1915 term, and within four days after the rendition of said finding and judgment, appellant filed its motions for a new trial and in arrest of judgment in said cause, as shown by orders of record then and there entered in said court.

Motions for New Trial and in Arrest of Judgment Overruled.

Afterwards, and on the said 18th day of November, 1915, and during said November, 1915, term, the said motions for new trial and in arrest of judgment were, by consent of the parties, taken up, considered and heard, and the court, on the same day and during the term aforesaid, by orders then and there entered of record, overruled said motion for a new trial and said motion in arrest of judgment.

Bill of Exceptions Filed.

Afterwards, on said 18th day of November, 1915, and during said term, appellant duly presented to said court its bill of exceptions in said cause, and the same was, on the day and at the term last aforesaid, duly approved, signed, sealed and ordered filed and made a part of the record in said cause, and the same was thereupon and on the day and at the term last aforesaid filed in said court and made a part of the record therein, as shown by orders of record then and there entered in the cause, as well as the file mark of the clerk endorsed on said bill of exceptions.

Appeal Granted.

On the day and at the term last aforesaid, appellant filed his affidavit for an appeal in said cause to the Supreme Court of Missouri, whereupon, by order duly made and entered of record on said day and at said term, an appeal was granted appellant to the Supreme Court of Missouri.

Transcript Filed.

Afterwards, and on December 6, 1915, and more than fifteen days before the regular April term, 1916, of the Supreme Court of Missouri, appellant filed in the office of the Clerk of the Supreme Court of Missouri a duly certified copy of the record entry of the judgment appealed from in the cause, showing the date, term, and day of the term upon which same was rendered, together with the order granting appeal, and on said date also caused to be filed in the office of the Clerk of the Supreme Court the original transcript of the record and

estimony and exhibits certified to by appellant and filed in said Cir uit Court of Cole county, Missouri.

The petition of respondent filed with appellant is as follows, aption and signatures omitted:

Petition.

The petition of Union Pacific Railroad Company respectfully shows:

11 I. That Union Pacific Railroad Company is a corporation organized under the laws of Utah, transacting business as a common carrier in the State of Missouri and also in the states of Iowa, Kansas, Nebraska, Colorado, Wyoming and Utah, with its principal place of business and post office address at New York City, New York; that annexed hereto are certified copies of its certificate of organization and of the several amendments thereof, marked exhibit A, and made a part hereof.

II. That a statement of the financial condition of the Union Pacific Railroad Company is annexed hereto, marked Exhibit B, and made a part hereof.

III. That on or about the 1st day of June, 1908, your petitioner executed to The Equitable Trust Company of New York, as trustee, a mortgage or deed of trust (hereinafter referred to as its first lien and refunding mortgage, to secure an issue of first lien and refunding mortgage four per cent bonds, a copy of which mortgage and the several supplements thereto are hereto annexed, marked Exhibit C, and made a part hereof; that said mortgage provided that $50,000,000 of the bonds authorized to be issued thereunder should upon the execution and delivery of the said mortgage be certified and delivered by the trustee and the said $50,000,000 of said bonds were so issued and are now outstanding. That said mortgage provided that bonds of the face value of $100,000,000 should be reserved to be issued thereunder for the purpose of refunding bonds secured by your petitioner's first mortgage, dated July 1, 1897, under which said first mortgage there are now outstanding $100,000,000 of bonds and none of said $100,000,000 of first lien and refunding mortgage bonds has been issued for refunding purposes as aforesaid:

12 that under section 4 of article second of said first lien and refunding mortgage $50,000,000, face value, of bonds thereby secured are reserved to be issued to reimburse your petitioner at their face value for expenditures made by it after the 1st day of June, 1908, for some one or more of the purposes specifically set forth in said section 4 of article second of said mortgage; that the said $50,000,000 of bonds so reserved are to be certified and delivered by the trustee to your petitioner only upon and subject to further conditions and restrictions contained in said section 4 of article second of said mortgage and of said $50,000,000 of bonds so reserved $15,385,640 have been issued and are now outstanding.

IV. That your petitioner has made expenditures on and after January 1, 1910, of the aggregate amount of $31,848,900 for par-

poses for which additional bonds may be issued and certified under said section 4 of article second of said first lien and refunding mortgage, that it has expended such sum from moneys in its treasury, and that none of such moneys was secured by or obtained from any issue of stocks, bonds, notes or other evidences of indebtedness issued for the purpose for which said expenditures were made or to reimburse your petitioner therefor: that petitioner is unable to state the sources of the moneys so expended since no account has been or is kept identifying specific moneys in the treasury of the company; that at all times during the period within which said expenditures were made, your petitioner has had a surplus of assets over liabilities and capital stock greatly in excess of the amount of such expenditures, but petitioner has never set apart or reserved any specific moneys, securities or other assets as being surplus, and no attempt has been made in its books of account to record, in respect of
13 the acquisition of any specific assets, the source of the funds with which such acquisition was made, whether from the proceeds of bonds or other securities issued or from moneys received as a part of its transportation earnings or other income. That the expenditures for said purposes are not in whole or in part properly chargeable to operating expenses and have not been charged to income, and that the moneys to be procured by the issue of said bonds are necessary to and reasonably required by said Company for reimbursement for such expenditures. That itemized statements showing such expenditures and the purposes thereof in detail are annexed hereto, marked Exhibit D, and made a part hereof.

V. That the additional bonds which your petitioner desires to issue under and secured by the lien of said mortgage are to be payable June 1, 2008, with interest thereon at the rate of four per cent per annum, payable semi-annually and are to be issued as to the principal amount of £4,000,00 payable in sterling money of the United Kingdom of Great Britain and Ireland and as to $11,848,900 payable in gold coin of the United States and are to be of the denominations authorized by said mortgage and in substantially the form set forth therein.

VI. That said bonds are to be issued by your petitioner and certified and delivered by the said The Equitable Trust Company of New York as trustee of said first lien and refunding mortgage to your petitioner at their face value, dollar for dollar, to the amount of such expenditures and are to be sold by your petitioner from time to time at the best prices obtainable and the proceeds applied to reimburse your petitioner for such expenditures.

14 VII. That the total estimated value of the property investment of your petitioner in the State of Missouri is $3,058,893.29 and that included in the amount of expenditures of $31,848,900 mentioned in paragraph numbered IV hereof the amount of expenditures for property within the State of Missouri is $124,930.38.

Wherefore, petitioner asks that the Public Service Commission of the State of Missouri authorize it to issue additional bonds under and secured by its first lien and refunding mortgage to the amount of $31,848,900 to be issued in the first instance to the principal amount

of £4,000,000 payable in sterling money of the United Kingdom of Great Britain and Ireland and payable in gold coin of the United States as to $11,848,900, and that the fees to be charged for the certificate authorizing said issue of bonds shall be based upon the expenditures made by your petitioner in the State of Missouri, namely, $124,930.38 included in the total expenditures of $31,848,900.

The bill of exceptions filed in said cause, omitting caption, is as follows:

Defendant's Bill of Exceptions.

Be it remembered, that heretofore, to wit, on the 18th day of November, 1915, this cause came on for hearing in the Circuit Court of Cole County, Missouri, during the November term, 1915, of said court, before the Honorable John G. Slate, judge thereof, and the following proceedings were had:

Appearances:

R. W. Blair and I. N. Watson, for plaintiff.
Wm. G. Busby and Alex. Z. Patterson, for defendant.

15 The cause was duly submitted on the day and at the term last aforesaid upon the pleadings, record, evidence and exhibits before the defendant Public Service Commission of the State of Missouri, and on the order of the said Commission, in the matter of the application of the Union Pacific Railroad Company for authority to issue additional bonds under its first lien and refunding mortgage to the amount of $31,848,900, being case No. 490 before the Commission, as certified to and filed in this court by the defendant. Said transcript of the pleadings, record, evidence and the exhibits, and the order of the said Commission, and the said certificate thereto of the defendant Commission being as follows:

The petition filed before appellant, here called for, and the bill of exceptions is hereinafter set out in this abstract.

Proceedings and Evidence Before the Appellant.

Appearances:

R. W. Blair, T. A. Ellis, for the Applicant.

(Caption omitted.)

Chairman Atkinson: Proceed, Mr. Blair, if you desire to make a statement.

Mr. Blair: If the Commission please, when we filed this application we were a little bit new in the practice. I didn't know just what the procedure was. We tried our best to conform to it, however, but Mr. Bradbury, your secretary, wrote me that we had omitted from

our application two exhibits required by the rules. Those are required under sections A and B, paragraph two, rule 18, page
16 19 of your pamphlet. One is the form of resolution to be adopted by the company authorizing the issuance of the bonds, and the other is a list of the stockholders. I now have been supplied with the form of resolution to be adopted by the stockholders of the company authorizing these bonds and ask to attach it to the application.

Chairman Atkinson: Very well.

Mr. Blair: I have also been furnished with the second from the comptroller, giving in a general way the number and character of the stockholders, but it doesn't give a full list of them. They tell me it would be a very large job and take a great deal of clerical work and we didn't really have time to get it out after this request was made. There are about 22,000 stockholders and I thought perhaps that rule only applied to cases where it was desired to issue new stock, and as this is simply a bond proposition I didn't know it would be deemed essential.

Chairman Atkinson: The Commission has held that would be a sufficient compliance in a case of this kind. You may file the statement. (Statement filed.)

Mr. Blair: Then that, I understand, makes our application and exhibits complete as far as our attention has been called to the matter. Now another thing, as the Union Pacific interests in Missouri are very small, has less than a mile of track in this state—the Union Pacific has less than a mile of main track in the State of Kansas——

Chairman Atkinson: You mean in Missouri.

Mr. Blair: State of Missouri, and the total value of all its property in Missouri is perhaps $3,000,000, something like that, and we didn't know just how far the Commission would feel it necessary to inquire into this matter on account of the small interests of the company in Missouri; therefore, we have come perhaps not fully pre-
17 pared to make as full a showing as the Commission might possibly think necessary, but we have here our chief engineer who can verify the statement which is already verified, however, by the president, showing the expenditures made in the betterment of the track, and things like that; things that properly come under his jurisdiction. We also have our general auditor, Mr. Sterling, here, who can testify generally to the expenditures made, and Mr. Ellis, assistant counsel for the company, is also familiar with practically everything in connection with the way these matters are handled by the company, and I think we ought to be able to answer any questions that the Commission may think it necessary to ask in regard to these matters, and perhaps it will shorten up matters if your honors will intimate on what points you may desire further information that is shown by our application and exhibits and we will attempt to give it to you. If we haven't officers here who can give that information you may consider it desirable, then we would expect to furnish it later on.

Chairman Atkinson: You might give us a little in detail as to the object of this issuance of bonds, if you can do that.

Mr. Blair: The bonds are to be issued under the terms of the mortgage, a copy of which was filed with the application for the purpose of reimbursing the railroad company for expenditures it made out of its general treasury to pay for betterments and improvements that are properly chargeable to capital accounts and should not be charged under the rule of the Interstate Commerce Commission to operating expenses. The Union Pacific happened to have money enough in its treasury received from various sources to advance the money to make these improvements and betterments. The
18 ordinary practice, I believe, in such cases is to borrow money as the company goes along and issue short-time notes perhaps to pay for the expenditures, but as I say, it just happened the Union Pacific had sufficient money in its general treasury, belonging to its general capital account, money that it keeps in its treasury as a general working capital, and it paid for these expenditures as it went along out of that fund. Now, as I understand it, it is the general rule which was first laid down, I think, by the Interstate Commerce Commission, that a railroad company would not be allowed to take from its operating revenue money to add to the capital account of the road, the object being, as I understand, to prevent the railroad company charging rates that might be considered exorbitant if it was allowed to extend its lines by getting money in that way. Now, these bonds, if issued and sold by the company, will furnish money to replace that that has been taken out of the general treasury of the company as it went along, and will simply leave the company with the working capital necessary to keep on hand at all times to meet operating expenses, to provide for lean years that we may run against in the future and things of that kind.

Chairman Atkinson: Who is your first witness, Mr. Blair?

A. Would your honor tell us what line of testimony is required.

Chairman Atkinson: We would like to have testimony as to these expenditures, the nature of them, and the authority under the mortgage for the issuing of the bonds and everything. I believe your auditor would come nearer giving us that information than anyone else.

19 H. J. STERLING, being called as a witness on behalf of the applicant, being duly sworn, testified as follows:

Com. Koerner: Mr. Blair, are you making this application before all of the Public Service Commissions in the states which have such that your line passes through?

Mr. Blair: Yes, sir.

Com. Woerner: Have you made any application in any others?

Mr. Blair: We have already received authority from the State Commission of Nebraska and our application to the Kansas Commission has been submitted. The Kansas Commission was satisfied with the showing we made except on one point. It asked Mr. Sterling to furnish some additional figures in regard to the revenue earned by the company for the last four years. Our showing over there

only showed the revenue as I recall it for the one year, while these expenditures were made during the last four years.

Com. Woerner: Have you made any application to the California Commission?

Mr. Blair: We don't run to California. The Union Pacific runs through Missouri, Iowa, Nebraska, Kansas, Colorado, Wyoming, and Utah. The western end of our line is at Ogden, Utah.

Com. Woerner: This is made under the general mortgage?

Mr. Blair: Yes, sir.

Com. Woener: Which authorizes the issuance of these bonds from time to time?

Mr. Blair: Yes, sir.

Com. Woerner: Have the series been issued under that mortgage heretofore?

Mr. Blair: Yes, sir.

20 Com. Woerner: How many times?

Mr. Blair: Mr. Ellis would know in regard to that.

Com. Woerner: All right; just let that go in the evidence; go ahead.

By Chairman Atkinson:

Q. You may state your name please?

A. H. J. Sterling.

Q. What position do you hold with the applicant company?

A. Auditor the Union Pacific Railroad Company.

Q. Where is the general office of the road?

A. The general office is in New York City.

Q. Are you familiar with the facts as detailed in this application and all of the exhibits attached thereto and now before the Commission?

A. Yes, sir.

Q. You may explain the terms of the first lien and refunding mortgage under which you propose to issue these bonds, giving us the date of it and the authorized bond issue.

A. It was dated June 1, 1908, and the mortgage was for $200,000,000.

Q. Now under what section and article of that mortgage do you propose to issue the bonds as prayed for in this application?

A. Under section 4, article 2, the page of the article is 29 and the section, four, begins on page 33.

Q. Now under that clause of the mortgage what amount of bonds are you authorized to issue and for what purpose?

A. We are authorized to issue under that section fifty millions of bonds to reimburse the railroad company for expenditures made by it for some one of the following purposes; do you want the purposes named?

21 Q. Just one minute. Will you give me the page you are reading from?

A. The section begins with page 33 right at the bottom of the page, just starts the paragraph there.

Q. No use to read the entire section, if you can just tell us the substance of it.

A. To reimburse the railroad company for amounts expended by it in the construction of additional lines, improvements and betterments to its property on the lines already in operation. The purchase of new equipment as additions to the property.

Q. Has any amount of the fifty million dollars of bonds as provided for under said section four of article two, been issued heretofore?

A. Yes, sir.

Q. What amount?

A. $15,085,640. Now issued and outstanding.

Q. Will you repeat those figures?

A. $15,085,640.

Q. They were issued when?

A. Part of them were issued by a supplemental indenture on June 28, 1909. The remainder by another supplement, April 22, 1910.

Q. Now there are certain conditions provided in that clause of your mortgage stating how these bonds may be issued. State to the Commission whether you have complied with those requirements in this present application now pending before this Commission. I mean by that, whether you have obtained the passage of the resolution as pointed out there and the signature of the president, of the road, vice-president, or chief engineer and the other requirements as provided in the mortgage?

A. The copy of the resolution is something I haven't with me. The counsel can testify as to that.

22 Mr. Ellis: The certified copy of the resolution which was submitted was passed on June 17, 1914, by the Board of Directors of the Union Pacific Railroad Company, as shown by the signature of the secretary.

Chairman Atkinson: And that is filed as an exhibit in this case?

Mr. Ellis: Yes, sir.

Chairman Atkinson: What about the certificate now as required, of the president, vice-president and chief engineer and also of the comptroller or auditor or treasurer of the company setting forth these expenditures?

The Witness: The certificates have been signed and filed with the Commission.

Mr. Ellis: Dated April 6th, June 17th.

The Witness: April 6th, and June 17th, respectively.

Mr. Ellis: And copies of those certificatees are filed with the Commission as an exhibit.

Chairman Atkinson: Now I wish you would take up and without too much detail tell us the nature and the place of some of these accounts, expenditures making this thirty-one million some hundred thousands of dollars for which you are asking to issue bonds.

A. The improvements charged to additions and betterments under the rules of the Interstate Commerce Commission consist largely of real estate, right of way and station grounds, $700,000; tunnels,

bridges, etc., in the neighborhood of two hundred thousand dollars—I haven't got the exact figures here and would have to add them together to get them.

Q. Very well; you may pass to the next item?

A. Increased weight of rail, track fastenings, $209,000.

23 Q. On that item tell us where you made that increase in your rails?

A. On the main line of the Union Pacific Railroad, between Omaha, between Council Bluffs and Ogden. There was a large amount expended; largely the increase is between those points.

Q. Well, you may take the next item of expenditures?

A. Improved switches, frogs, etc., track fastenings, $106,000; ballasting of track, a small amount, $3,000; sidings and spur tracks, $203,000; terminal yards, $12,000; elimination of grade crossings, $12,000; blocks, signal, and other apparatus, $22,000; telegraph and telephone lines, $42,000; freight and passenger stations, $60,000; stock yards, $18,000; improvements to station grounds, $25,000.

Mr. Blair: He is only giving the round figures, your Honor.

Chairman Atkinson: That will be sufficient.

A. Other station buildings, $24,000; roadway machinery and tools, $30,000; shop buildings and appurtenances, $11,000; engine houses and appurtenances, $42,000; other shop buildings, $14,000; shop machinery and tools, $176,000; fuel stations, $11,000; pumping stations, gravity water supply, standpipes and water tanks, $67,000; bunk houses, section houses, $6,000; timber treating plants, $2,000; track scales, $21,000; other additions and improvements at station such as yard piping, laundry machinery, pipe lines, elevator indicators, etc., $29,000; additional main track $9,265,000.

Chairman Atkinson: Now that is the total for the several items you read, isn't it, Mr. Sterling?

A. Yes; but I haven't read them all yet. We have got some more.

24 Mr. Blair: Mr. Chairman, you asked him if that total was the sum of all the items he had read; it is only the items of the main track.

Chairman Atkinson: Those he had read on down to that.

A. We have special jobs that is called consisting of paint and wheel shops, hose houses, air compressors, gasoline storage tanks, storage buildings, planing mills, shop buildings and appurtenances, $390,000; new general office building, $1,334,000; sub-postoffice building, $35,000; improvements in yards, $55,000; engine houses and yards, $40,000; terminals, $1,118,000; gravity water supplies, $295,000; fuel stations, $90,000; protection of banks, $1,500; yard tracks, $16,000; air compressors, $8,000; coaling station at Cheyenne, $5,000. Now, that is all on the main line from Council Bluffs to Ogden. We have like expenditures on the main line from Kansas City west.

Chairman Atkinson: Very well; you may, in your own way, give us the general facts as you have so far, on the other line.

A. Real estate and station grounds, $41,000; protection of banks
d drainage, $19,000; bridges and trestles, including culverts, $96,-
00; increased weight of rail, frogs and switches, $23,000; track ap-
rtenaces, $10,000; sidings and spur tracks, $71,000; right of way
neing, $1,000; block and other signal apparatus, $118,000; high-
ay crossing signals, $2,000; telegraph and telephone lines, $2,000;
eight and passenger stations and fixtures, $15,000; stock yards,
2,000; roadway machinery and tools, $3,000; shop buildings and
purtenances, $4,000; engine houses and apparatus, $9,000; fuel
ations, $4,000; pumping stations, gravity water supply, stand pipes,
water tanks, $31,000; snow and sand fences, $16,000; section
5 houses, $6,000; timber treating plants, $2,000; track scales,
$3,000; other additions and betterments consisting of the
admaster's office, water main connections, fire protection, $2,000;
hanges of line, $2,000; additional main track, $5,000; depots and
ards, $21,000; Kansas City freight terminal facilities, $113,000;
ridge at Kansas City, Kansas, $325,000; shop at Denver, $167,000;
errick at Denver, $5,000; coaling stations, $8,000.

On the line from Denver to Cheyenne: Right of way and station
rounds, $5,000; bridges, trestles and culverts, $6,000; track fasten-
ngs and apparatus, $6,000; ballast, $3,000; sidings and spur tracks,
13,000; terminal yards, $14,000; block and other signal apparatus,
40,000; freight and passenger stations and fixtures, $10,000; stock
ards—I haven't been given those small items.

Q. You may omit the small items.

A. Just leave that one out. Improvement to station grounds,
800,00; fuel stations, $2,000; pumping water stations, $26,000;
tand pipes, water pipes, $1,000; snow and sand fences, snow-sheds,
15,000; grade reductions and change of lines, $3,000; additional
main track, $80,000.

Branches on the Kansas division: Protection of banks and drain-
ge, $2,000; bridges and trestles, $10,000; sidings and spur tracks,
1,000; freight and passenger station and fixtures, $1,000. Branches
f the main line between Omaha and Ogden: Sidings and spur
racks, $3,000; fencing and right of way, $2,000; engine house,
4,000; pumping stations, $2,000; right of way and station grounds,
700; track fastenings and appurtenances, $600; ballast, $4,000; sid-
ngs and spur tracks, $3,000; fencing right of way, $1,000; grade
reductions and change of line, $34,000; bridges and trestles,
26 $1,000; increased weight of rail, $700; track scales, $1,000;
stock yards, $1,000; right of way and station grounds, $1,-
000; bridges and trestles and culverts, $21,000; protection of banks
nd drainage, $5,000; increased weight of rail, $13,000; improved
frogs and switches, $1,000; track fastenings and appurtenances,
5,000; ballast, $3,000; sidings and spur tracks, $10,000; right of
way fences, $3,000; improvements to over and under grade crossings,
1,000; freight and passenger stations and fixtures, $1,000; stock-
yards, $1,000; stand pipe, water tanks, $5,000; track scales, $4,000;
special jobs, consisting of reduction and changes of line and so forth,
$10,000; real estate, $2,000; bridges, trestles, $6,000; increased

weight of rail, $8,000; track fastenings and appurtenaces, $13,000; fencing, $2,000; sidings and spur tracks, $2,000.

Chairman Atkinson: You have a large list of additional items there, I suppose?

A. Yes, sir.

Q. I think I can shorten it some. Now, as auditor of the road, you are familiar with these various items as shown in this exhibit you are testifying from, are you?

A. Yes, sir.

Q. And those expenditures have been made by the road, have they?

A. Yes, sir.

Q. Tell the Commission now, how you keep your accounts with reference to additions and betterments in accordance with the requirements of the Interstate Commerce Commission's rules on accounting.

A. Our accounts of expenditures for both operation and for additions and betterments are kept in exact accordance with the
27 rules of the Interstate Commerce Commission.

Q. You mean by that now you don't charge anything to capital account where it ought to be charged to operation?

A. No, sir.

Q. And the reverse as to the other?

A. And the reverse.

Q. According to your personal knowledge are there any items charged in there to capital account that ought not to be charged?

A. No, sir.

Q. All of them have been properly charged according to the rules of the I. C. C. Commission?

A. Yes, sir; barring clerical errors, they are absolutely all chargeable to capital account.

Q. Now these expenditures were made from January 1, 1910, down to what date?

A. The expenditures for construction, improvement to road, went down to April 30, 1914, from Jan. 1, 1910 to April 30, 1914.

Q. Now this includes all of the new extensions and additions and betterments made over that period for which you were authorized to issue bonds under section four of article two?

A. Yes, sir; but I didn't answer in full.

Q. Very well, you may answer in full.

A. There was an expenditure in addition to those that I just read of $11,278,592.06 for additional rolling stock during that period of time.

Q. And that has been provided for in what way, by the issuance of trust obligations?

A. It hasn't been provided for. It has been bought and paid for but hasn't been provided for.

28 Q. You mean by that you haven't issued any bonds to reimburse the treasury for that eleven million dollars of expenditures?

A. Yes, sir.

Q. For rolling stock. Now you are not including that item in this $31,000,000.

A. Yes, sir; that item is a part of that.

Q. Oh; that item is included in this $31,000,000?

A. Yes, sir.

Q. Now on that item, tell us how you purchased the rolling stock; what means did you go about to get the best price for the material you wanted; what is your procedure?

A. The New York office purchases all of our rolling stock and as to their means of procedure I am not acquainted with.

Q. Do you know whether it is bought on competitive bids submitted to the company?

A. I couldn't say as to that.

Q. In what way have you done the construction work where you have had to employ a good large amount of labor and material; how has that been done, on competitive bids to various contractors, or was it done by some sub-contracting firm for the road?

A. Our chief engineer is here, and that work was all done under his direction and under his direct supervision, and probably his testimony will be better than mine.

Q. Very well, we will hear him on that point. Now I want to get the history of this a little plainer in the record. On June 1, 1908, you issued what you call your first lien and refunding mortgage, did you?

A. On June 1, 1908.

29 Q. Your first lien and refunding mortgage was issued and since that time you have issued a number of supplements to same?

A. The bonds were not issued at that time. There were fifty millions of bonds issued at that time under that mortgage, but the remainder was not issued.

Q. Under that date you executed a mortgage known as the first lien and refunding mortgage?

A. Yes, sir.

Q. Which provided for issuing first lien and refunding mortgage bonds?

A. That is right.

Q. Four per cent bonds?

A. Four per cent bonds.

Q. To be due in 2008?

A. Yes, sir.

Q. Run a hundred years.

A. In 100 years.

Q. Under the terms of that mortgage you issued fifty million dollars at that time, what did you issue that fifty million for, for taking up obligations of the road, or did you issue it for extensions and betterments to get new money to go into the business?

A. I am not familiar with the exact purpose for which that fifty million was issued.

Q. Now under the terms of that mortgage you provided you may

issue one hundred million dollars to refund bonds which have heretofore been issued under the first mortgage dated July 1, 1897; have you issued any of that one hundred million dollars to refund your obligations as provided under the terms of this mortgage of June 1, 1908?

A. No, sir.

Q. That obligation to the extent of one hundred million is still outstanding?

30 A. Still outstanding.

Q. What rate of interest do you pay on these bonds if you remember?

A. First mortgage you are asking for?

Q. Yes.

A. Four per cent.

Q. Now you provided further under the terms of this mortgage of June 1 ,1908, that you may issue fifty million dollars under section four of article two, and that you have already issued $15,085,640, and that you want to issue on this application an additional amount of $31,848,900. Now that is the extent of the mortgages of the Union Pacific is it Mr. Sterling?

A. The $100,000,000 and the $65,000,000 and the $31,000,000.

Q. That you now propose to issue?

A. That is the extent of our mortgages, yes, sir.

Q. Now tell us about the amount of stock that your company has issued?

A. The total of stock now outstanding?

Q. Yes, sir; and the kind?

A. There are now outstanding of common stock valued at $222,291,600; preferred, $99,543,500, making total stock outstanding of $321,835,100.

Q. Now you spoke of the stock being valued at such amount; do you mean that is the par face of it or the value of the stock over par or under par?

A. I haven't got those figures to answer.

Mr. Blair: I understand the question is whether they were par when issued?

Chairman Atkinson: Yes; the figures you gave us, were those par value figures of the stock or were they figures over par or under par?

Mr. Ellis: None of our records show the market value or any value on that stock except——

31 Com. Woerner: Must be par, because your market value changes every day don't it?

Mr. Blair: He can answer that by showing the number of shares at $100.00 par value each.

Chairman Atkinson: What has been the dividends paid by the Union Pacific for the past five years, Mr. Sterling?

A. Rates or amounts, which?

Q. Well, just give the rates if you have the percentages?

A. The rates on preferred stock have been four per cent; on common stock they were at the rate of ten per cent for the four years

immediately preceding last, and the last year they were at the rate of ten per cent for half a year, and the remainder at the rate of eight per cent, making a rate paid in the last year of nine per cent.

Q. And the interest, of course, has been promptly paid on the bonded obligations of the road?

A. Yes, sir.

Q. Do you know anything about what the stock was issued for originally?

A. No, sir; I don't.

Q. I believe the Union Pacific went through the hands of a receiver, didn't it, reorganization within recent years?

A. Yes, sir.

Q. What was the date of that if you remember?

A. My recollection is it was 1898. April 1, 1898.

Q. And as I remember in the reorganization, the owners of the old stock were permitted to come in and take shares of the new stock and pay a certain assessment or dividend on their stock. I believe that was the general plan, wasn't it, Mr. Sterling?

32 A. I am not familiar enough with that to testify on that.

Q. How long have you been with the Union Pacific in the auditing department?

A. In the auditing department I have been since February 18, 1886, but for a period of the time I was at Portland and not as auditor.

Q. Not closely connected with the reorganization end of the road, I suppose?

A. No, sir.

Q. I think that is common knowledge, that the old stockholders were saved by giving them stock in the new company and by their paying a small assessment of some ten or fifteen dollars per share. Did the Union Pacific distribute the eighty million dollars this year to the stockholders that there was some litigation about in New York or some of the other states?

A. There was but $75,000,000.

Q. Did that go to the common stockholders or preferred stockholders?

A. The common stockholders.

Q. What was the contest about that, briefly?

A. I am not familiar enough with that to testify on that.

Q. Very well, then.

Mr. Ellis: I could make a statement with regard to that, because I conducted the litigation in regard to it. The preferred stockholders brought an action claiming that under their contract they were entitled to a share in the extra dividend. The terms of preference of the preferred stock and the articles of association provided such preferred stock shall be entitled to preference and priority over the common stock of said corporation, to dividends in each and every fiscal year at such rate not exceeding four per — annum pay-

33 able out of net profits as shall be declared by the board of directors. Such dividends to be noncumulative and the preferred stock is entitled to no other or further share of the profits.

Chairman Atkinson: It was merely then a contest between the preferred stockholders and common stockholders.

Mr. Ellis: As to the construction of that provision.

Chairman Atkinson: And in no way affected the financial standing of the road.

Mr. Ellis: No, although in that litigation the court in one of the cases went into the financial history of the road very carefully and determined they had this surplus much in excess of the amount necessary to pay these dividends. That was directly brought up in one proceeding.

Com. Woerner: What states does your road run through, Mr. Sterling?

The Witness: Runs through Missouri, Kansas, Colorado, Iowa, Nebraska, Wyoming, Utah.

Q. And which of those states have you presented this application to for permission to issue bonds?

A. I only know of Kansas and Nebraska so far. Our attorney knows.

Q. Do you expect to present them in all of such states that have a Commission?

A. Yes, sir.

Q. How many miles of road are there on the Union Pacific?

A. 3,615.35 of main track.

Q. How much of that is in Missouri?

A. Of main track, less than one mile.

Q. Less than one mile in this state?

34 A. Yes, sir; in an ease-way; six-tenths in a general way.

Q. What would you consider, roughly speaking, the value of the road in Missouri?

A. About three million dollars.

Q. And this mortgage, of course, is to cover properties of the road in all the states through which you pass?

A. Yes, sir.

Q. Under the laws of what state are you incorporated?

A. Utah.

Q. Any other state?

A. That is all.

Q. What did you say was the aggregate capital stock of the company, about?

A. I said about, outstanding, $321,000,000.

Q. Well, that will do. Could you give us a rough estimate of what might be the entire value of the road?

A. I could give you a statement of our assets as taken from the books.

Q. Well, if that is the best you can give us, what is that?

A. Property investment.

Q. What is the total?

A. Sir.

Q. What is the total?

A. Total assets, $716,272,475.75.

Q. As of what time was that?
A. June 30, 1914.
Q. Against you have got outstanding how much in the way of onds, the aggregate?
A. Aggregate outstanding of bonds, $191,920,865.00.
Q. Does that include the proposed issue of thirty-one million odd dollars you are now asking for?
A. No, sir.
Q. Adding that to it would be about two hundred and twenty or 1 illion?
A. $222,000,000; 223,000,000 millions in all.
Q. Is that the entire bonded indebtedness?
A. Yes, sir.
Q. Are those bonds all in the same class?
A. I don't understand the question.
Q. Are there any underlying bonds, you understand what I ean?
A. No, I don't.
Q. What is the first lien?
A. $100,000,000.
Q. One hundred million dollars. Now then these bonds you are eking to issue now are part of the lien that is inferior to that issue f one hundred millions isn't it?
A. On part of the road, yes, sir; on the remainder of the road some arts of the road, the first lien don't cover.
Q. A substantial part of it?
A. No, not a substantial part of it; a part of it.
Q. Well, these are practically second mortgage bonds?
A. Yes, these bonds are subject only to the first mortgage bonds.
Q. Well, the first mortgage bonds are a hundred million?
A. A hundred million and these bonds are subject to those.
Q. Is provision made in the mortgage of 1908 for the taking up of that one hundred millions of underlying bonds?
Q. Yes, sir—well, yes, sir—does that answer the question?
Q. Yes, but that has not yet been done?
A. No, sir.
Q. In figuring the issuance of these second mortgage bonds you ook into consideration the first mortgage bonds and set aside out, propose to set aside out of the bonds to be issued under the ortgage of 1908, the sum of a hundred million dollars to take care f the first mortgage bonds, do you not?
A. The first lien refunding mortgage provided that one hundred illion of these bonds should be set aside for refunding of these.
Q. So that for the purpose of security of the bonds, they are practically all of them on the same basis are they not?
A. In so far as the first and second mortgage are related to each ther.
Q. The first mortgage bonds are taken care of in this mortgage?
A. Yes, sir.
Q. Which authorized an issue for how large an amount; this ortgage of 1908?

A. Two hundred millions.

Q. Of that you are going to take care of the underlying bonds of one hundred millions?

A. Yes, sir.

Q. And practically provide for a new issue of one hundred millions of bonds?

A. Yes, sir.

Q. The practical effect of which is that all of these bonds are equally secured?

Chairman Atkinson: It isn't true at all the people who own this first hundred million dollars will come in and accept bonds under this second hundred millions; it is a matter of argument that
37 the man who has his mortgage under the first hundred million has the prior lien.

Com. Woerner: I understand that, but the security for the two hundred millions is really only to take care of one hundred million dollars of the underlying bonds and the new issue of one hundred million dollars.

The Witness: That is it.

Com. Woerner: Now do those bonds all carry four per cent?

A. Four per cent, yes, sir.

Q. What did you get for the bonds that were issued?

A. That have been issued?

Q. Yes?

A. I don't know.

Q. What do you expect to get for the bonds you are now issuing; you propose to issue?

A. We want to get all we can. We want face if we can get it.

Q. Do you expect to get that?

A. I don't know. That depends on the money market.

Q. This is a bad time to issue bonds isn't it?

A. Well, the protection; the large assets of the Union Pacific Railroad make its paper very attractive.

Q. Well, the City of New York has just issued bonds on a six per cent basis; do you expect to get about par for these bonds?

A. That is a financial question I am not familiar with.

Q. You are not prepared to answer that?

A. I can't answer that.

Q. You are not asking for permission to sell them at less
38 than par are you?

A. I don't think we have stated the figure. We can state we would like to sell them at the highest rate we could.

Q. I have no doubt of that.

A. But I believe we haven't named any specific figure. It is somewhere in here, in the petition. Quotes: "And are to be sold by your petitioner from time to time at the best price obtainable."

Q. Well, you know the Commission if it authorizes the issuance of that will have to fix a minimum at which they can be sold.

A. I presume that is so.

Q. You are not asking for any specific percentages for which ey could be sold?

A. No, we haven't asked that.

Q. What is the reason why you ask for the sale of these bonds t this time, Mr. Sterling?

A. Because the money has been paid out of the treasury, and e want to reimburse the treasury.

Q. You think this is as good a time as any to issue bonds?

A. I am not very familiar with the bond market.

Com. Shaw: I understand you to say that your accounts are ept strictly in accordance with the Interstate Commerce Commi- ion's provision for accounting rules and so forth?

A. Yes, sir.

—. Will you explain how you get such items as increased eight in rail, what you do in handling that on your book, or hat the result is?

A. The increased weight of rail over the rail taken up and eplaced.

Q. Is that the actual weight taken up or the weight of that taken up when it was originally laid?

39 A. The weight when originally laid and the rail is replaced, but the weight taken up and charged to operating expenses.

Q. If in the first place you had laid a fifty pound rail and then later put down a seventy pound rail, you would charge twenty pounds to the increased weight of rail would you?

A. Yes, sir.

Q. Well now, how do you handle your ballast; you had some items for ballast in there, didn't you?

A. Yes, sir. The ballast, new ballast where no ballast previously existed is charged to betterments; reinforcements of ballast, repairs of ballast already existing is charged to operating expenses.

Q. Is the idea to have in the capital account an amount for ballast that corresponds to the amount of ballast that exists at the present time, or does it include ballast that may have been wasted or something of that kind?

A. In the capital account?

Q. Yes. Does it include all the expenditures for ballast, or does it include an expenditure corresponding to the amount of ballast that is there?

A. It includes expenditures for new ballast only. All ballast that is put in, repairing, or taking care of other ballast already there is charged to operating expenses and not to betterments.

Q. Now in making changes of line, how do you handle that in your accounts; do you depreciate your capital account by the old line and capitalize the new cost of the new line?

A. The line abandoned is reduced, and the new cost charged to capital account.

40 Q. I notice you had some figures for track scales. Can you tell us the capacity and type you have been putting in and about the cost of one scale?

A. Our chief engineer is here and I think he is familiar with that question. I am not familiar with the exact figures as to capacity.

Q. You had an item for expenditures for terminals in Kansas City; is that your own terminals in Kansas City?

A. Our freight station at Kansas City.

Q. Has no connection with the terminal organization—association there?

A. It is not a part of it.

Q. Not a part of it. It connects with them physically?

A. Oh, yes.

Q. But definitely a part of your own system?

A. Of our own station.

Q. Now, in regard to all of these items contained in the $31,000,000, can they be classified under the head of expenditures for the acquisition of property, construction, completion, extension or improvement of facilities. Can they all be included under that item?

A. Yes, sir.

Q. Has any part of it been used for maintenance of service?

A. No, sir.

Q. Any part used for replacement?

A. No, sir; excepting in so far as any replacing there is an improvement over the other, the replaced part has all been charged to operating expenses.

Q. That wouldn't be for replacement there.

A. Wouldn't be for replacement.

Q. Was any part of this $31,000,000 reasonably chargeable to operating expenses?

41 A. No, sir.

Q. During what period have they been made; just the date of the beginning?

A. January 1, 1910, to April 30, 1914.

Q. You have kept in touch with these expenditures of that period?

A. Yes, sir.

Q. And were they reasonable amounts for those improvements and the property acquired, etc., in your opinion?

A. Yes, sir. A large amount of the charges were made up from our regular pay rolls; material taken from our own stock.

Q. The attempt is made on the part of the railroad company to acquire these facilities and improvements in the best manner and at the least cost for the best type of construction?

A. Yes, sir.

Chairman Atkinson: I want to put this question to you broadly. You are familiar with all these exhibits, representations and statements contained in the exhibits and in the petition, and what is your answer now as to the trueness and correctness of those representations to this Commission for this bond issue? Are they true and correct according to your best knowledge and belief?

A. Yes, sir. I watched the charges, supervised the charges throughout the entire time, and I am satisfied that they are true and correct charges to capital account.

Q. About what has been your average annual expenditure for these purposes over other years than the period the bond issue covers? Here it averages for a little more than four years about, between seven and eight million dollars a year. Now, have your additions and replacements—I mean extensions and additions and extensions and betterments, run in the neighborhood of seven to eight million dollars per annum?

42

A. I could answer that by stating that the two supplemental agreements that we issued on this fifty million for the period from June 1, 1908, to December 31, 1909, amounted to $15,085,000, and that would sort of average it up pretty well.

Q. You have the one item, rather large item, here, of eleven million dollars for rolling stock. Of course, that would average over the period of four years and some months; that would run about on an average with the other expenditures of the road?

A. I would think so.

Mr. Blair: The item about expenditures covered by that exhibit there, made in the State of Missouri, what was that for?

A. $125,000. Sidings and spur tracks, $5,356.00; Kansas City freight station, freight depot, $90,472.00; paving around the depot, $23,135.00; bridge at Kansas City, Kansas——

Q. Well, that is in the State of Kansas. I am just asking for these items in the State of Missouri.

A. I am talking now about the Missouri portion of that. Bridge from Kansas City to Kansas City, Kansas, bridge across to Kansas City, Kansas, proportion situated in the State of Missouri, $6,099.00; total, $125,000. From which there was a slight credit for some stuff taken up.

Mr. Ellis: Then, Mr. Sterling, included in this item of $3,848,900, the only amount expended in the State of Missouri, is approximately $125,000; is that correct?

A. Yes, sir.

43

Q. And the only property purchased with the expenditure of $31,000,000 is property purchased with the $125,000 which you have just specified?

A. Yes, sir.

Com. Kennish: Is your company part owner of the stock of the Terminal Railroad Company at Kansas City?

A. Yes, sir.

(Witness excused.)

R. L. Hantley, being sworn, testified as follows:

By Chairman Atkinson:

Q. What position do you hold with the Union Pacific?

A. Chief engineer.

Q. Are you familiar with these expenditures for which bonds are now asked to be issued and which have been covered by Mr. Sterling's testimony?

A. Entirely so.

Q. Tell the Commission whether, in your opinion, they were reasonably necessary for the convenience of the public and the service of the road?

A. Absolutely so.

Q. To what extent have you personal knowledge of the various items of expenditures?

A. I have supervised all the estimates and either directly or indirectly supervised all the work.

Q. Now, suppose you were building a new station where an old one was torn down, what was your method of ascertaining the difference between the cost of the new and old?

A. I took the actual cost; if we haven't that, the estimated cost to reproduce and deduct it from the cost of the new one, and charge the difference to capital account; the increased charge.

Q. Were you able in all instances to obtain from the rec-
44 ords of the road the original cost of the old station buildings?

A. No, sir.

Q. Then you merely estimated?

A. Estimated the cost to reproduce the old one.

Q. Now, in these estimates to capital account, what percentages have you figured for engineering supervision and contingencies, if any?

A. Estimated the cost to reproduce from the general basis on the cost of stations. For instance, on costs per square foot for similar structures as they actually come out in the work.

Q. Have you in mind any one item of expenditure for a bridge or station building where you figured the difference, where you could give us the concrete figures?

A. No, I don't know that I have.

Q. You would have to go to your records, I suppose.

A. I would have to get the records.

Q. What do you say about the average of this expenditure over the period of time which has been testified to from January 1, 1910, down to April 30, 1914; is this about the average cost of replacements and additions and extensions?

A. Outside of equipment, with which I am not familiar, the capital account expenditures average about the same since the reorganization of '98. (1908.)

Q. Taking the eleven million dollars for equipment from the thirty-one million, you would have about twenty million expended in four years, or about five million a year.

A. Between one and a half and two million is about the average per year for ordinary additions and betterments. The difference between that and the actual amount represents the second
45 track; new, additional second track.

Q. How many miles of new additional second track was constructed during this period?

A. I don't remember.

Q. You would be unable to give that without going to your records.

A. You asked something about the scale, I believe.

Com. Shaw: Yes, I would like to hear about that.

Q. Our track scales average between $3,200 and $4,200, depending on the foundation.

Q. What is the capacity?

A. We call them 100-ton capacity. They are a fifty-foot platform, but the disk below the platform has a capacity of weighing 150 tons.

Q. How do you test those?

A. We have a test scale and a car that goes over the road. We have only recently had a test scale from the Fairbanks people, and it is located at Denver.

Q. Master scale?

A. Master scale; yes, sir.

Q. How much of your line has block signals on it?

A. I have forgotten just the mileage. We have double-track automatic-block service and single track all the way from Council Bluffs to Ogden; from Kansas City to Salina, and from Cheyenne to Denver. We are contemplating some more on the Colorado division next year.

Q. How is the rest of the road handled? Is it manual block?

A. Telegraph order system.

(Witness excused.)

46 Chairman Atkinson: Mr. Sterling, you have the various annual reports your road has been making for four or five years, haven't you.

Mr. Sterling: I have them, but not here.

Chairman Atkinson: You haven't filed those with these exhibits, have you?

Mr. Sterling: No.

Chairman Atkinson: It has been the custom of the roads to file their annual reports of the company for five years, and will you be so kind as to file that?

Mr. Sterling: Yes, sir.

M. Ellis: The annual reports are rather confusing because they combine the Union Pacific and the Oregon Short Line and the Oregon-Washington Railroad and Navigation Company, and it is practically impossible to determine anything in regard to the Union Pacific from the annual report, but, of course, that is explained in the report; the three are combined together.

Chairman Atkinson: Very well. They will speak for themselves. Mr. Blair, who is your next witness?

Mr. Blair: About the only thing I can think of now is on this question of minimum price at which the bonds should be sold, and I think Mr. Ellis should explain that.

Mr. Ellis: I don't think I should take the stand as a witness, and I can't state the price we would like to have inserted in the order. Heretofore we have obtained permission from the Kansas City and Nebraska Commissions as to the issuance of bonds under this mortgage in the form which we have requested it from this Commission,

that the bonds shall be issued and certified by the trustee and then they are held in the treasury until such time as a market can be obtained. Of course, it is true, as you know, at the present
47 time it is practically impossible to sell bonds. It certainly would be very difficult to do and it could only be done at a loss, and this company doesn't intend at the present time to sell these bonds, but they would like to get this cleared out because such a long period has elapsed here now, four years. We would like to get them issued and then hold them in the treasury until such time as there is a market.

Chairman Atkinson: The Commission wouldn't want you to sell them on such a market as you have now unless you could get up towards ninety or ninety-five.

Mr. Ellis: We couldn't, and I think when the stock exchange closed July 31st, this issue of bonds were selling at about eighty-eight, I think, and, of course, in view of the financial condition in the world today, it is impossible to determine what the market price of these bonds will be when the market opens.

Chairman Atkinson: Wouldn't it be better for you to issue them and hold them in the treasury and when you do get ready to sell them file a supplemental application, asking the Commission to fix the minimum? We would issue two forms of orders, one naming the minimum, say at ninety or ninety-five, and the other one merely provide that when the applicant gets ready to sell the bonds, apply by subsequent application. If we were to go and fix a minimum now it might injure the sale of your bonds in the future.

Mr. Ellis: I didn't know you had that provision, and that was one of the things where it meant a great deal to this application, because we have never had that minimum fixed, and to have the minimum fixed at this time would be very difficult.

Chairman Atkinson: I think it would be better to leave it open. It would be no expense to file a supplemental order. You
48 can show the market is so and so, and what effort you have made to do the very best you could toward getting them on the market.

Mr. Ellis: I think that is a very good solution.

Com. Shaw: You expect not to sell these bonds until you can sell them somewhere near par.

Mr. Ellis: The market for the same bonds as this was 88 I think in July.

Com. Shaw: One of the witnesses testified you wanted them near par.

Mr. Blair: He is the auditor and he wants to get all the money he can.

Mr. Sterling: I said we wanted to get as near par as we could.

Mr. Blair: Mr. Sterling wants his treasury replenished in the amount of thirty-one million dollars if he can accomplish it.

Chairman Atkinson: What do you say, Judge Kennish?

Com. Kennish: I have no objection.

Chairman Atkinson: Judge Woerner?

Com. Woerner: I have no objections.

Chairman Atkinson: Doctor Shaw?
Com. Shaw: I have no objection.
Chairman Atkinson: The order will be granted.
No further evidence was introduced.
Whereupon the hearing in the above case was closed.

49 STATE OF MISSOURI,
County of Cole, ss:

I, T. M. Bradbury, Secretary of the Public Service Commission of the State of Missouri, do hereby certify that the above and foregoing is a full, true and correct transcript of all the pleadings, record and proceedings before the Public Service Commission of the State of Missouri in the matter of the application of Union Pacific Railroad Company for authority to issue additional bonds to the amount of $31,848,900 under its first lien and refunding mortgage, Case No. 490, fully as the same appear and remain of record in the office of said Commission; that the exhibits returned herewith as a part of this transcript are all of the original exhibits as offered in evidence in said case.

In testimony whereof I have hereunto set my hand and affixed the seal of said Commission at office in Jefferson City, Missouri, this the 1st day of December, 1914.

T. M. BRADBURY,
Secretary.

Afterwards, on the said 18th day of November, 1915, and during the said November, 1915, term of the said court, the court rendered and caused to be entered its findings and judgment therein setting aside the order of the defendant, Public Service Commission of the State of Missouri, being the order under review in this cause. (The finding and judgment here called for in the bill of exceptions is hereinbefore set out.)

To which finding and judgment of the court the defendant then and there duly excepted, and still excepts. The order of the Commission set aside by the aforesaid judgment is as follows:

50 September 23, 1914.

Case No. 490.

Mr. R. W. Blair, General Attorney, U. P. R. R. Co., Topeka, Kansas.

DEAR SIR: Please find enclosed three certified copies of order of this Commission in above case, of date September 22, 1914, of which kindly acknowledge receipt on attached blank. Your Mr. George Ellis took the other two copies ordered.

I also enclose bill for fees due the department for filing, etc., and for the five copies of order.

For the Commission,

T. M. BRADBURY,
Secretary.

Case No. 490.

Union Pacific R. R. Co., Mr. R. W. Blair, General Attorney, Topeka, Kansas.

To Missouri Public Service Commission, Dr.

To filing application, exhibits, issuing order, etc., in above case	$10,962.25
To five certified copies of order therein of date September 22, 1914	14.00
Total	$10,976.25

Order.

JEFFERSON CITY, Mo., September 22, 1914.

Section 1. Application having been made to the Public Service Commission by Union Pacific Railroad Company, under the provisions of the Public Service Commission Law, for the consent
51 of the Commission to the issuance by said company of bonds to the amount of thirty-one million eight hundred forty-eight thousand nine hundred dollars ($31,848,900), face value, said bonds to be payable on the 1st day of June, 2008, and to bear interest at four per cent (4 per cent) per annum, payable semi-annually, and secured by said company's first lien and refunding mortgage upon property of the company therein described; and a hearing having been duly held upon said application before the Commission, Chairman John M. Atkinson presiding, and it being now the opinion of the Commission:

1. That the money to be procured by the issue of said bonds of the said Union Pacific Railroad Company to the amount of thirty-one million eight hundred forty-eight thousand nine hundred dollars ($31,848,900), face value, payable at a period of more than twelve months after the date thereof, is necessary to and reasonably required by said company for the reimbursement of moneys actually expended from income or from other moneys in the treasury of the corporation not secured by or obtained from the issue of stocks, bonds, notes or other evidence of indebtedness of such corporation, for the acquisition of property, construction, completion, extension and improvement of its railroad and facilities, and particularly for the purposes which are hereinafter stated in this order.

2. That, except as to such amount as the Commission may hereafter allow for the purpose of defraying expenses of approval and sale of the bonds hereby authorized and of making up discount thereon, said purposes are not in whole or in part reasonably chargeable to operating expenses or to income.

Section 2. It is Ordered that the Public Service Commission does hereby authorize the issue by the said Union Pacific Railroad
52 Company of thirty-one million eight hundred forty-eight thousand nine hundred dollars ($31,848,900), face value, of

principal of bonds of said company, maturing the 1st day of June, 2008, redeemable September 1, 1918, or any interest date thereafter at 107½ per cent of the par or face value thereof besides accrued interest, and to bear interest at four per cent (4 per cent) per annum, payable semi-annually, under and in pursuance of the terms of the first lien and refunding mortgage heretofore and on the 1st day of June, 1908, made and executed by the said Union Pacific Railroad Company to The Equitable Trust Company of New York, as trustee.

Section 3. It is Ordered that said issue of bonds is authorized upon the conditions following and not otherwise, to wit:

First. That said Union Pacific Railroad Company shall sell said bonds hereby authorized as and when deemed advisable by its officers, at a price to be hereafter fixed by this Commission upon further application of said Union Pacific Railroad Company, and that the proceeds of the sale of said bonds shall be placed in the treasury of said company for reimbursement of moneys heretofore expended from its treasury for the acquisition of property, construction, completion, extension and improvement of its railroad and facilities and for other purposes as set forth in the application herein and exhibits thereto attached.

Second. That all expenses in connection with the approval of said bonds, and all discounts and commissions which may hereafter be authorized by this Commission to be made and allowed in connection with the sale of said bonds, shall be amortized out of the income of the company before the 1st day of June, 2008, by the pay-
53 ment into an amortization account of an equal annual installment each year during the life of said bonds, or any of them, of an amount sufficient to amortize and pay off the total of said discounts, expenses and commissions on or before the 1st day of June, 2008, said installments to begin June 1, 1915.

Third. That said company shall keep separate, true and accurate accounts showing the receipt and application in detail of the proceeds of the sale or disposal of the bonds hereby authorized to be issued, and at the end of each six months said company shall make verified reports to the Commission stating the sale or sales of said bonds during the previous six months, the terms and conditions of sale, the moneys realized therefrom, and the use and application of such moneys; and said accounts, vouchers and records shall be open to audit and may be audited from time to time by accountants and examiners designated for such purpose by the Commission.

Fourth. That the authority hereby given to issue such bonds shall apply only to bonds issued by the said company on or before the 31st day of December, 1914.

Section 4. It is Ordered that this order shall take effect on this date, and, except as provided in the fourth paragraph of section 3 of this order limiting the duration of the authority to issue such bonds herein granted, continue in force until otherwise ordered by the Commission, and that within ten days after service upon it of a copy of this order said Union Pacific Railroad Company notify the Commission whether the terms of this order are accepted and will be obeyed.

Afterwards, on the said 18th day of November, 1915, and during

the November, 1915, term of said court, and within four days
54 after the rendition of said finding and judgment, the defendant duly filed its motion for a new trial, and also its motion in arrest of judgment in the cause, which said motions are in words and figures as follows, caption and signatures being omitted:

"Defendant's Motion for New Trial.

Comes now the defendant and moves the court to set aside the finding and judgment heretofore rendered in this cause and to grant it a new trial herein for the following reasons:

First. Because the finding and judgment of the court is against the law.

Second. Because the finding and judgment of the court is against the evidence.

Third. Because the finding and judgment of the court is against the law and the evidence, and against the weight of the evidence.

Fourth. Because the finding and judgment of the court should have been for the defendant; and should have affirmed the order of said Public Service Commission assessing fees.

Fifth. Because the court erred in reversing and remanding the said order entered by defendant in the proceeding before it.

Sixth. Because the Public Service Commission Law of Missouri, approved March 17, 1913, conferred jurisdiction on the defendant Public Service Commission of the State of Missouri, in respect to the authorization of bond issues and the fees to be charged therefor of both domestic and foreign railway corporations doing business in the State of Missouri, and required the defendant to assess the fees in controversy in this action at the sum of $10,962.25; and the court erred in its finding that the order of the Commission assessing such
fees at said sum was unreasonable and unlawful, and setting
55 aside said order of the Commission and reversing and remanding this cause to said Commission with directions that it fix and assess said fees at the sum of $250.00.

Seventh. Because the finding and order of the defendant Public Service Commission of the State of Missouri in fixing and assessing the fees in controversy in this action was in compliance with the requirements of section 21 of the Public Service Commission Law of Missouri, approved March 17, 1913, and other provisions of said law, and was in all things reasonable and lawful, and the court erred in holding that such order of the Commission was unreasonable and unlawful, and in setting aside said order of the Commission, and in reversing and remanding said cause to the Commission.

Eighth. Because the court erred in its finding and judgment reversing and remanding the defendant's order in this case for the reason that the plaintiff was barred and stopped from denying the authority of the defendant to approve the plaintiff's bond issue, and to fix and assess fees therefor as provided in the Public Service Commission Law of Missouri, approved March 17, 1913, since the plaintiff itself expressly recognized such authority on behalf of the Commis-

sion in its application and proceeding before the Commission for such approval."

56 *"Defendant's Motion in Arrest of Judgment.*

Comes now the defendant and moves the court to arrest the finding and judgment in this cause for the following reasons:

First. Because upon the record, evidence and exhibits certified to and filed by the defendant in this cause in this court the finding and judgment of this court is erroneous.

Second. Because upon said record, evidence and exhibits the finding and judgment of the court should have been for the defendant and should have affirmed the order of the defendant fixing and assessing the fees in controversy in this action.

Third. Because the court erred in overruling the defendant's motion for new trial herein."

Afterwards, on the 19th day of November, 1915, and during the said November term, 1915, of said court, said motions for new trial and in arrest of judgment were taken up by consent of the parties, and the same, and each of them, were by the court, by an order then and there entered of record, overruled; to which action of the court in overruling said motions and each of them, defendant, by its counsel, then and there duly excepted and still excepts.

Afterwards, on the said 19th day of November, 1915, and during the said November term, 1915, of said court, the defendant filed its affidavit and application for appeal to the Supreme Court of Missouri, and deposited the docket fee in the sum of $10.00 with clerk of court, and an appeal was duly allowed to the Supreme Court of Missouri by an order then and there entered of record.

57 In order that the above matters and things, rulings and exceptions may be made a part of the record in this cause, the defendant here presents its bill of exceptions, within the time heretofore allowed for that purpose, and prays that the same may be approved, signed, sealed, filed and made a part of the record herein; which is accordingly done this 19th day of November, 1915, and during the November term, 1915, of said court.

J. G. SLATE,
Judge of the Circuit Court,
Cole County, Missouri.

58 APPENDIX.

Acceptance of Order.

(Caption Omitted.)

Comes now Union Pacific Railroad Company, by A. L. Mohler, its President, duly authorized, and hereby accepts the order of the Commission, dated September 22, 1914, in the above entitled cause, and agrees to obey the terms of said order.

Protest.

(Caption Omitted.)

Union Pacific Railroad Company hereby pays under protest the sum of $10,962.25, being the amount of fees assessed and demanded for certificate authorizing the issue by said company of $31,848,900, face value, of additional first lien and refunding mortgage bonds.

Protest is made upon the grounds:

1st. That said assessment is not authorized by the Public Service Commission Law of the State of Missouri, approved March 17, 1913, under which it purports to have been made; and,

2nd. That if such assessment is authorized by said statute,
59 said statute and said assessment are in conflict with the Constitution of the United States and the amendments thereto, in that they impose a burden and tax on the interstate business of said company, and a burden and tax upon said company's property beyond the limits of the State of Missouri.

And you are hereby notified that this payment is made involuntarily and under duress, and without waiving the assertion and claim that the assessment is illegal, unauthorized and void, and such payment is made solely to escape the penalties prescribed and to prevent the revocation of the certificate issued herein, and to enable said company to issue and sell the bonds referred to in said certificate which are necessary to the carrying on of its business as a common carrier.

You are further notified that a petition for rehearing of the decision fixing the fees herein at the sum of ten thousand nine sixty-two dollars and twenty-five cents ($10,962.25) will be immediately filed and such further proceedings will be taken as are necessary to recover such sum less the sum of one hundred and twenty-five dollars ($125.00) this day tendered as the legal fees herein, and you are further respectfully notified not to disburse the money hereby paid until the legality of the fees are finally determined.

Motion for Rehearing.

(Caption Omitted.)

The petition of Union Pacific Railroad Company respectfully shows:

1. That heretofore your petitioner filed a petition herein verified the 4th day of September, 1914, praying for authorization to issue additional bonds under and secured by its first lien and refunding mortgage to the amount of $31,848,900, and that thereafter and on the 22nd day of September, 1914, a hearing was duly held
60 on said application and a certificate was thereupon issued and filed, dated the 22nd day of September, 1914, authorizing the issue of said bonds of the aggregate principal amount of $31,848,900.

2. That thereafter the Commission assessed and fixed the fees to be charged for the issue of said certificate at $10,962.25, based upon the amount of $31,848,900, being the aggregate principal amount of bonds to be issued.

3. That the sum of $250 is the maximum amount of fees chargeable at the rates mentioned in section 21 of the Public Service Commission Act, based upon the expenditures made by your petitioner in the State of Missouri, namely: $124,930.38, as to which the issue of bonds was approved as aforesaid.

4. That your petitioner is a common carrier engaged in transacting business in the States of Missouri, Iowa, Kansas, Nebraska, Colorado, Wyoming and Utah, and owns 3560.41 miles of railroad in such states, of which .51 of a mile is located in the State of Missouri; that your petitioner has a line of railroad extending from Cheyenne, Wyoming, through Denver, Colorado, and Topeka, Kansas, to Kansas City, Kansas and Kansas City, Missouri, the eastern terminus of said line of railroad being at Kansas City, Kansas, and Kansas City, Missouri; that the entire property of your petitioner in the State of Missouri is a part of such terminal properties and that the entire business of petitioner in the State of Missouri consists of the receipt or delivery of traffic originating in or destined to states other than the State of Missouri, and constitutes exclusively interstate trade and commerce.

5. That the book value of petitioner's entire property investment as of June 30, 1914, was $281,057,730.06, representing all
61 physical properties of petitioner owned and used for its railroad business; and that the estimated value of petitioner's entire property in the State of Missouri does not exceed $3,058,893.29, and that petitioner was engaged in interstate trade and commerce and owned property in the State of Missouri prior to the enactment of the Public Service Commission Law of the State of Missouri, substantially to the same extent and in the same manner as at the present time, as aforesaid.

6. That your petitioner is a corporation duly incorporated under the laws of the State of Utah and is duly authorized by its charter and by the laws of said state to issue bonds for such sum or sums and payable at such times and places and drawing interest at such rate as the directors may deem proper and to execute trust deeds or mortgages or both upon the whole or any part of the railroad lines and other property then owned or thereafter acquired by such corporation and situated within or without, or partly within and partly without, said State of Utah, to secure the payment of such bonds and interest.

7. That on or about the first day of June, 1908 your petitioner duly authorized and executed with the Equitable Trust Company of New York as trustee a mortgage or deed of trust to secure an issue of first lien and refunding mortgage four per cent bonds (a copy of which mortgage and copies of the several supplements thereto are on file herein); that said mortgage was duly recorded and became a lien prior to the enactment of the Public Service Commission Law of the State of Missouri upon substantially all of the

railroad properties of your petitioner, including its property in the State of Missouri, and the property appurtenant thereto subsequently acquired in said state; and that the expenditures of $124,-
62 930.38 in said state hereinafter referred to were made for property appurtenant to property specifically subjected to the lien of said mortgage at the time of execution thereof, namely; June 1, 1918; that at the time of the execution of said mortgage $50,000,000 face value of bonds were issued thereunder; that under section 4 of article second of said mortgage, $50,000,000 face value, of additional bonds thereby secured were reserved to be issued to reimburse your petitioner at their face value for expenditures made by it after the first day of June, 1908, for some one or more of the purposes specifically set forth in said section 4 of article second of said mortgage consisting generally of the purchase or construction of additional lines of railroad and the construction of additions and betterments to lines of railroad subject to said mortgage and the purchase of additional rolling stock and equipment; that of said bonds so reserved, $15,085,640 were issued prior to June 30, 1910, making a total issue of bonds outstanding under said mortgage of $65,085,640 prior to the enactment of the Public Service Commission Law of the State of Missouri.

8. That your petitioner has made expenditures on and after January 1, 1910, of the aggregate amount of $31,848,900 for purposes for which additional bonds may be issued under said mortgage; that the board of directors authorized and directed the issue of bonds for the purpose of funding such expenditures; that said expenditures are particularly shown by the petition and exhibits filed herein; that included in said expenditures of $31,848,900 the amount of expenditures made by your petitioner for property within the State of Missouri is $124,930.38; and that said expenditures of $31,848,900 constitute the basis of said issue of bonds men-
63 tioned in paragraph I hereof; that petitioner has made said expenditures for purposes which, under the Interstate Commerce Commission classification, must be charged to property investment account; and that your petitioner from time to time acquires property and makes additions and betterments to property already owned by it, the expenditures for which, under said Interstate Commerce Commission Classification, must be charged to said property investment account, and it is necessary for your petitioner to issue and sell stocks or bonds to raise the money with which to make such expenditures or to reimburse the treasury of the company for moneys temporarily expended from it for such purposes.

9. That said Public Service Commission has, ever since its creation, asserted jurisdiction under the Act aforesaid to authorize or disapprove proposed bond issues by foreign and interstate corporations having any property or doing any business in the State of Missouri. That such assertion of jurisdiction would have constituted a cloud upon the validity and legality of petitioner's bond issue and rendered it unmarketable if petitioner had not secured the approval thereof by said Commission. That said Act provides severe penalties enforcible against the corporation and its officers and agents upon the

issue of bonds, without the approval of said Commission, in violation of said Act. That no procedure existed, as petitioner was advised, by which a construction of said Act could be obtained and the jurisdiction of said Commission determined, in advance of the issue of said bonds and the incurring of said penalties, and that therefore, to avoid said cloud upon the validity of said bonds and the possible penalties aforesaid, petitioner was compelled to make application as aforesaid to said Commission for the approval of said
64 bond issue and that said application was not made voluntarily, but under the compulsion and duress aforesaid.

Wherefore, your petitioner prays for a rehearing of the assessment of fees made by the Public Service Commission of Missouri as aforesaid, upon the following grounds:

First. That the Public Service Commission Act of the State of Missouri enacted March 17, 1913, does not authorize the charge of the fees assessed by the Commission because by the terms of said Act:

either (*a*) The jurisdiction of said Commission in respect of the authorization of bond issues and the fees to be charged therefor is limited to bond issues of corporations organized or existing under the laws of the State of Missouri; and petitioner is not such a corporation;

or (*b*) the said jurisdiction, if any, of the Commission in respect of the authorization of the bond issue, described in this petition, by petitioner, a foreign corporation, and the fees to be charged therefor, is limited to the authorization of bonds to an amount equivalent to the expenditures within the State of Missouri included in the aggregate expenditures for which said bond issue is to be made.

Second. That the said Public Service Commission Act, if construed as empowering the Commission to authorize, and assess fees upon, the entire aforesaid issue of bonds of petitioner, and as prohibiting such issue by petitioner without the approval of the Commission and the payment of said fees is in excess of the
65 & 66 powers of the State of Missouri, and in conflict with the provisions of the Constitution of the United States, and the amendments thereto, and therefore void, in that:

(*a*) Said Act constitutes a regulation of commerce among the several states and an interference with and burden upon the conduct by petitioner of the interstate business and commerce in which it is engaged.

(*b*) Said Act, and the fees assessed thereunder against petitioner as described in this petition, constitute a regulation and taxation of property and rights of petitioner outside the State of Missouri and a deprivation of petitioner's property without due process of law.

Supplemental Order No. 1.

Now at this time comes on to be considered the motion of the Union Pacific Railroad Company, party applicant in the above entitled case, praying that the Commission enter upon a rehearing of

said case in respect of the assessment of fees upon the bonds therein authorized to be issued.

Now, after due deliberation, it is

Ordered: 1. That the motion of the Union Pacific Railroad Company for a rehearing in the above entitled case be and the same is hereby overruled.

Ordered: 2. That this order shall take effect on this date.

67 Which said 1st paragraph on page 19 of said mortgage is in words and figures as follows:

"But in trust, for the equal and proportionate benefit and security of all present and future holders of the bonds issued and to be issued under, and secured by, this indenture, and for the enforcement of the payment of said bonds and of the interest thereon, when payable, and the performance of, and compliance with, the covenants and conditions of this indenture, without preference, priority or distinction as to lien or otherwise of any one bond over any other bond issued hereunder by reason of the purpose of its issue, so that each and every bond issued or to be issued hereunder shall have the same right lien and privilege under and by virtue of this indenture, and so that the principal and interest of each bond shall, subject to the terms hereof, be equally and proportionately secured hereby, as if all had been duly issued, sold and negotiated simultaneously with the execution and delivery hereof."

68 Which said Section 4 of Article Second of said mortgage is in words and figures as follows:

Section 4. After the lines of railroad, with their franchises and appurtenances, described in Section 2 of this Article shall have been subjected to the lien of this indenture in the manner and by the conveyance prescribed in said section, and not before, the remaining $50,000,000 of bonds to be issued under this indenture as and when executed by the Railroad Company, shall be certified and delivered by the trustee, from time to time, to the Railroad Company to reimburse the Railroad Company for expenditures made by its after the date hereof for some one or more of the following purposes (in so far as such purposes shall be purposes for which such bonds may lawfully be issued), viz:

I. The construction of additional lines of railroad connecting with, and of extensions and branches of, the lines of railroad then subject to this indenture.

II. The acquisition by purchase or by merger or consolidation of additional lines of railroad connecting with the lines of railroad then subject to the lien of this indenture.

III. The construction of additional main track required in double tracking any of the lines of railroad then subject to this indenture.

IV. The construction of tunnels and bridges and the reduction of grades or curvative upon any of the lines of railroad then subject to this indenture.

V. The purchase of rolling stock and other equipment for use upon any of the lines of railroad then subject to this indenture.

VI. The purchase and improvement of additional real estate for

use in connection with the operation or maintenance of any of the lines of railroad then subject to this indenture; the construction, purchase or acquisition of terminals, yards, shops, depots, warehouses and other structures which shall be required or be
69 useful or convenient in the operation or maintenance of any of the lines of railroad then subject to this indenture; and the construction or purchase of other additions to, and improvements and betterments of and upon, any of the lines of railroad then subject to this indenture.

But the said $50,000,000 of bonds so reserved for the purposes above, in this Section 4, set forth shall be certified and delivered by the Trustee to the Railroad Company only upon and subject to the following conditions and restrictions, viz:

(1) There shall in every case be delivered to the Trustee the following instruments, namely:

(*a*) A copy of a resolution or of resolutions of the Board of Directors of the Railroad Company, requesting the Trustee to certify and deliver a specified amount of said bonds to reimburse the Railroad Company for expenditures made by it for one or more of the purposes for which such bonds are reserved under this section.

(*b*) A certificate signed by the President or one of the Vice-Presidents or Chief Engineer, and also by the Comptroller, Auditor or Treasurer of the Railroad Company, setting forth that stated expenditures were made after the date hereof on account of one or more of said purposes, and stating, as the case may be, the general description and location of the additional lines of railroad or the branches or extensions constructed or under construction or acquired and the expenditures therefor, or the additional main track constructed or under construction in double tracking any of said lines of railroad and the expenditures therefor, or the general description and location of the grades or curvature reduced, or the general character and location of the tunnels or bridges constructed or under construction and the expenditures therefor, or the general character and location of the real estate, terminals, yards, shops, depots, warehouses or other structures purchased, improved or constructed or under construction or acquired and the expenditures therefor and the general character and location of the other additions,
70 improvements or betterments purchased or constructed or under construction and the expenditures therefor, and the number and character of the engines, cars or other equipment purchased and the expenditures therefor; and also setting forth that said expenditures were not in excess of the fair value of such property, or of such work, or of such betterments, improvements or additions, and that none of such expenditures was included in any expenditures reported by the Railroad Company in any annual report as having been charged to operating expenditures or other cost of maintenance. Such certificate shall further show that no portion of the expenditures so certified was included in any certificate previously furnished to the Trustee under this Article.

(*c*) In case the expenditures so certified shall have been made for the construction or acquisition of additional railroads or branches

or extensions or main track, or for the acquisition of real property, or for the purchase of rolling stock or other equipment then in actual use by the Railroad Company to the Trustee specifically subjecting such railroads, branches or extensions or main track or real property, or rolling stock or equipment as the case may be, to the lien of this indenture.

(*d*) An opinion of counsel that such railroads, branches, or extensions, as the case may be, are free from any mortgage or lien prior to the lien of this indenture, and that this indenture constitutes a first lien thereon, or an opinion of counsel that such additional main track constructed or under construction in double tracking any of the lines of railroad then subject to this indenture, or such engines, cars or other rolling stock or equipment, or such terminals, real estate, structures, additions, improvements, betterments or other property, as the case may be, are free from any mortgage or lien prior to the lien of this indenture, unless it be the lien of the said First Mortgage executed by the Railroad Company to The Mercantile Trust Company, as Trustee, under date July 1, 1897, and that this indenture constitutes a lien thereon.

71 (2) At any and all times the Railroad Company will execute and deliver to the Trustee any and all such further assurances or conveyances of the property certified to have been constructed or acquired as aforesaid, as the Trustee shall reasonably direct or require for the purpose of expressly and specifically subjecting the same to the lien of this indenture.

(3) The Trustee may receive the certificate of the Secretary or one of the Assistant Secretaries of the Railroad Company, under the corporate seal of the Railroad Company, as conclusive evidence of the adoption by the Board of Directors of the Railroad Company of any of the resolutions hereinbefore provided for. The same officer or officers of the Railroad Company need not certify to all the facts required to be certified to under the provisions of this Section 4, but different officers may certify to different facts and opinions. The resolutions, statements and certificates required or provided by any provision of this Section 4 to be delivered to the Trustee as a condition of the certification of bonds hereunder may be received by the Trustee as conclusive evidence of any fact pertaining to its right or duty to certify and deliver bonds pursuant to Section 4 of this Article, and shall be full warrant, authority and protection to the Trustee acting on the faith thereof, for the certification by it of such bonds, not only in respect of the facts expressed in such resolution, statement or certificate, but also in respect of the opinions therein contained.

(4) Upon the delivery to the Trustee of all the instruments hereinbefore in this Section 4 required to be delivered for the purpose of authorizing the certification and delivery of bonds reserved under said section, and upon the delivery to the Trustee of all such further assurances and conveyances, if any, as shall be required by it, as aforesaid, the Trustee shall certify and shall deliver to the Railroad Company bonds secured equal at their face value to the amount

certified to have been expended by the Railroad Company,
72 as aforesaid, or to the greatest multiple of $1,000, contained therein. The bonds so certified and delivered may be used by the Railroad Company for any of its lawful corporate purposes.

73 In the Supreme Court of Missouri, Division No. One, April Term, 1916.

No. 19318.

UNION PACIFIC RAILROAD COMPANY, Respondent,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, Appellant.

Thereafter, to-wit, on April 14th, 1916, the following further proceedings were had and entered of record in the above entitled cause:

"Come now the said parties, by attorneys, and after arguments herein, submit this cause to the Court, with leave of ten days to the said appellant to file reply briefs herein and five days additional to the said respondent to file reply thereto."

And thereafter, to-wit, on July 3rd, 1916, the following further proceedings were had and entered of record in said cause:

"UNION PACIFIC RAILROAD COMPANY, Respondent,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, Appellant.

Appeal from the Circuit Court of Cole County.

"Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here now being sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Cole County rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which it has lost by reason of the said judgment. It is further considered and adjudged by the Court that the said cause be remanded
74 to the said Circuit Court of Cole County for further proceedings to be had therein in conformity with the opinion of this Court herein delivered, and that the said appellant recover against the said respondent its costs and charges herein expended and have therefore execution.

(Opinion filed.)

Which said opinion is in words and figures as follows:

75 In the Supreme Court of Missouri, Division No. 1, April Term, 1916.

No. 19318.

UNION PACIFIC RAILROAD COMPANY, Respondent,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, Appellant.

Appeal from the Circuit Court for Cole County.

The Union Pacific Railroad Company is a Utah corporation. Its principal office is in New York City. It owns and operates about three thousand five hundred miles of railroad in the states of Iowa, Nebraska, Wyoming, Utah, Colorado, Kansas and Missouri, its main lines extending from Kansas City, Missouri, and Council Bluffs, Iowa, by way of Cheyenne, Wyoming, to Ogden, Utah. It was constructed more than twenty-five years ago and has been used for the transportation of freight and passengers from, to, through and between those states. It has about six tenths of a mile of main track in Missouri, extending from the Kansas state line to the old Union depot in Kansas City, and also has side tracks, freight house and other terminals upon its own lands in said city, all being of a value which it estimates at $3,058,893.29. The book value of its entire property investment on June 30, 1914 was $281,057,730.06.

Of date June 1, 1908, it executed a "first lien refunding mortgage" of all its property securing a proposed issue of two hundred million of first mortgage four per cent bonds, one hundred million of which were to be used in refunding a like amount out-
76 standing of old first mortgage bonds. None of the refunding bonds were issued, leaving the first mortgage still in force as a first lien. Of the remaining one hundred million, sixty-five million eighty-five thousand six hundred and forty dollars had been issued prior to June 1, 1910. On September 4, 1914, the company made application to the Public Service Commission of Missouri for permission to issue $31,848,900.00 more of bonds secured by said new mortgage, to reimburse it for expenditures made upon the property for purposes authorized by the mortgage, $124,930.38 of which had been expended upon the Missouri property. On September 22, 1914, the appellant commission, after a hearing, made its order, granting a certificate authorizing the issue of said bonds as applied for, taxed the amount of its fee to be charged for the issuance of said certificate at the sum of $10,962.25, which was the amount provided by the terms of section 21 of the Public Service Commission Act of March 17, 1913 on the full amount of bonds covered by said application. On the next day the secretary of the commission transmitted copies of the order to respondent's attorney at Topeka, Kansas, accompanied by its statement of the amount of fee taxed therefor as above stated, which order was afterward accepted by respondent in

writing as follows: "Comes now Union Pacific Railroad Company, by A. L. Mohler, its president, duly authorized, and hereby accepts the order of the Commission, dated September 22, 1914, in the above entitled cause, and agrees to obey the terms of said order." The respondent paid the said sum of $10,962.25, the amount of the fee so assessed, after offering to pay the sum of $125.00 based upon the proportion the amount so expended in Missouri bore to the whole amount of the bonds to be issued, which offer was refused by the Commission. It then offered to pay $250.00, the minimum fee authorized by the statute, which was also refused. At the same time it made the following protest in writing:

"Union Pacific Railroad Company hereby pays under protest the sum of $10,962.25, being the amount of fees assessed and
77 demanded for certificate authorizing the issue by said company of $31,848,900, face value, of additional first lien and refunding mortgage bonds.

"Protest is made upon the grounds:

"1st. That said assessment is not authorized by the Public Service Commission Law of the State of Missouri, approved March 17, 1913, under which it purports to have been made; and,

"2nd. That if such assessment is authorized by said statute, said statute and said assessment are in conflict with the Constitution of the United States and the amendments thereto, in that they impose a burden and tax on the interstate business of said company, and a burden and tax upon said company's property beyond the limits of the State of Missouri.

"And you are hereby notified that this payment is made involuntarily and under duress, and without waiving the assertion and claim that the assessment is illegal, unauthorized and void, and such payment is made solely to escape the penalties prescribed and to prevent the revocation of the certificate issued herein, and to enable said company to issue and sell the bonds referred to in said certificate which are necessary to the carrying on of the business as a common carrier.

"You are further notified that a petition for rehearing of the decision fixing the fees herein at the sum of ten thousand nine hundred sixty-two dollars and twenty-five cents ($10,962.25) will be immediately filed and such further proceedings will be taken as are necessary to recover such sum less the sum of one hundred and twenty-five dollars ($125.00) this day tendered as the legal fees herein, and you are further respectfully notified not to disburse the money hereby paid until the legality of the fees are finally determined."

It then immediately filed its motion for a rehearing upon said assessment of the fee, which was overruled by respondent and the
78 record was then taken by writ of review as provided in section one hundred and eleven of the Public Service Commission Act, to the circuit court for Cole county, where, upon hearing, it was considered and adjudged that the order of respondent fixing the fee for the issuance of bonds by the plaintiff Union

Pacific Railroad Company, amounting to $31,848,900.00, at the sum of $10,962.25, was and is unreasonable and unlawful," and the said order was therefore set aside by the circuit court which fixed the fee to be paid by the respondent at $250.00, the minimum fee provided by said section twenty-one of the Act, and remanded the cause to the appellant Commission with direction to enter its order fixing the fee at that amount.

It is from this order that the present appeal is taken.

I. The respondent Railroad Company has furnished us with an elaborate argument as to the power of the Public Service Commission, under the terms of the statute which created it, to take cognizance of the issue of these bonds, and also upon the power of the General Assembly to confer such jurisdiction, as affected by certain provisions of the Federal Constitution relating to interstate commerce and the property rights guaranteed by the first section of the fourteenth amendment to that instrument. However interesting these questions may be we must not lose sight of the nature and scope of the proceeding in which they are presented.

It was instituted by the presentation to the appellant Commission of an elaborate petition setting forth at length the organization of the respondent, its financial condition and the purpose for which it desired to issue the bonds in question and asking the authority of the Commission for that purpose. It does not question the constitutionality of the provision of the Public Service Commission Act which the petitioner was invoking for that purpose, nor intimate that the Commission was without authority to grant it the desired relief. What it wanted was such authority as the Commission could grant under the act, for the purpose, as it now explains, not only of protecting itself and its agents from penalties provided in the act, but to give value to the securities by such evidence of
79 their validity and security as the inquiry and action of the Commission might afford. The respondent obtained and accepted the coveted order, and made no attempt to have it vacated or modified in respect to the authority it granted, but while retaining its benefits denies its liability to pay the amount which the act prescribes as compensation to the state for the issue of the certificate. Even its motion for a rehearing before the Commission is confined solely to the assessment of the fee, so that both parties agree that the only question in this appeal is whether the respondent should be required to pay the sum of $10,962.25 as assessed by the Commission, or $250.00 as determined by the circuit court by the judgment from which this appeal is taken. The respondent has elected, without protest, to submit itself to the jurisdiction of the Commission, and is satisfied with the judgment of the circuit court. It desires to obtain the endorsement of the appellant Commission as cheaply as it can, and the price is the only thing with which we have to deal.

II. It is true that respondent now suggests that it would not have applied for this order but for the stringent provisions of the Public Service Commission Act. This may be true but we can see in the record many reasons why it might have desired the endorsement

of the state as to this security even had no penalty been imposed by the act. It has more than three million dollars worth of real property in the state acquired by authority of a statute which imposes the condition that it shall be subject to all the duties, liabilities and provisions of the laws of this state concerning railroad corporations as fully as if incorporated in this state (1 G. S. Mo. 1879, sec. 790). It was incorporated under the laws of Utah from which it takes its general powers. While we have no doubt that the Congress of the United States might constitute corporations in the exercise of its constitutional powers with reference to commerce between the states, we do not think it has ever been contended that it might carry the laws of one state into the jurisdiction of another
80 without giving them its own authority by reenactment. It is incompetent for Utah under any guise to direct how real property within the jurisdiction of this state shall be conveyed, incumbered, or diverted from the use to which it has been devoted by our laws. As we said in the late case of De Lashmutt vs. Teetor, 261 Missouri, 412, l. c. 433-4, "It is not to be conceived that any government would permit the title to the lands which constitute the foundation and define the territorial limits of its sovereignty, to depend upon the operation of the laws of any foreign State or Nation. Real estate transfers of every description, whether by act of the parties or by operation of law, depend, for their validity and effect, upon the laws of the jurisdiction in which the property is situated." In this case it is sought to incumber this three million dollars worth of property by a mortgage of thirty-one million dollars and its validity and conformity to the provisions of our own laws would evidently receive valuable support from the sanction of the state through its own agency, at least so far as the Missouri security goes. In this particular case a property of the book value of two hundred eighty-one million, of which the Kansas City terminal was a part, was already incumbered with mortgages to secure bonds amounting to more than one hundred sixty-five million dollars to which this thirty-one million was to be added. Its capital stock outstanding consisted of more than two hundred twenty-two million dollars of common stock and about one hundred million of preferred stock. The bonds in question were to go into the treasury of the company to reimburse it for moneys that it claimed to have expended during the preceding five years for betterments, but whether this money had come from its earnings or from speculation or from former issues of bonds and stocks neither the lawyers before the Commission nor its auditor who was present knew. The common stock had while this thirty-one million dollars was being ex-
81 pended, paid dividends amounting to one hundred million dollars, while the preferred stock had paid dividends amounting to twenty million dollars. Under these circumstances who shall say that it was not of interest to the purchaser of these securities as well as to the state whether these betterments had been paid for from capital already applicable to that use or from earnings, and the opinion of the Commission, expressed in its order, that the bonds

came fairly within the provision of the mortgage would not be of advantage in their disposition.

III. The fee fixed by law for this inquiry is primarily to reimburse the state for the maintenance of the Commission and is in no sense a tax in the ordinary meaning of that term. The legislature has seen fit to distribute this burden upon a plan having reference to the value and importance of the services, which are highly technical in their nature. The matter lay in its constitutional discretion, and the plan adopted was clearly within that discretion and is embodied in section 21 of the act, which, so far as it refers to this particular fee is as follows:

"The commission shall charge and collect the following fees. * * * For certificate authorizing an issue of bonds, notes or other evidence of indebtedness, one dollar for each thousand dollars of the face value of the authorized issue, or fraction thereof, up to one million dollars, and fifty cents for each one thousand dollars over one million dollars and up to ten million dollars, and twenty-five cents for each one thousand dollars over ten million dollars, with a minimum fee in any case of two hundred and fifty dollars."

The assessment was made in exact accordance with this legislative direction which affords the only rule for the guidance of the commission. The powers of the commission having been invoked and exercised under the act which created it, we must look to the act for the terms imposed. The assessment of the Commission
82 must, therefore, be sustained.

IX. We have already held that the respondent, having without protest, or question, availed itself of the privileges and immunities incident to compliance with the Public Service Act at the expense of the state, cannot now deny the existence of the power which it invoked, for the sole purpose of avoiding the payment of the fee fixed by the legislature for the same services before it requested their performance. We have also held that this fee was fixed by law in the reasonable exercise of the legislative discretion, and is therefore reasonable and proper, and must now be paid. It remains to notice in a general way, the cases cited by the respondent. These may be divided into four classes: (1) those like the Missouri case of Westlake and Button vs. St. Louis, 77 Missouri, 47, in which we properly held that where a water rate greater than that permitted by law had been paid under business duress, the excess might be recovered back; (2) those cases in which equity is invoked on the ground that the remedy at law is rendered burdensome and dangerous by the pains and penalties by which it is jeopardized; as in the late cases of which Ex Parte Young, 209, U. S., 123 is typical; (3) those cases in which it is sought to enforce such excessive penalties; as in Railway vs. Tucker, 230 U. S. 340; and (4) those cases in which, as in Railway vs. O'Conner, 223 U. S. 280, it is sought to recover back illegal taxes paid with protest under duress of the pains and penalties and business annoyance and injury which might result from permitting them to remain apparent charges against property. It is plain that such cases have no relation to a case in which it is sought to avoid paying to the state the statutory fee for

rvices performed at the request of the complaining party, relying upon its own judgment as to their legal necessity or desirability.

3 The judgment of the circuit court for Cole county is reversed and the cause remanded to that court with directions affirm the action of the Public Service Commission in assessing he fee to be paid by the respondent at the amount of $10,962.25. Railey, C., not sitting.

STEPHEN S. BROWN,
Commissioner.

er Curiam:

The foregoing opinion of Brown, C., is adopted as the opinion of he court. All concur except Woodson, J., not sitting; Bond, J., n result.

4 And thereafter, to-wit, on July 10th, 1916, the following further proceedings were had and entered of record in said ause:

n the Supreme Court of Missouri, Division No. One, April Term, 1916.

"No. 19318.

UNION PACIFIC RAILROAD COMPANY, Respondent,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, Appellant.

Comes now the said respondent, by attorney, and files its motion or a rehearing and motion to transfer this cause to Court in Banc."

And thereafter, to-wit, on July 18th, 1916, the following further proceedings were had and entered of record in said cause:

"No. 19318.

UNION PACIFIC RAILROAD COMPANY, Respondent,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, Appellant.

Now at this day the Court having fully considered the motion for a rehearing herein and motion to transfer to Court in Banc, heretofore filed by the said respondent, doth order that said motions, and each of them, be and the same are hereby overruled."

Which said motions for rehearing and to transfer to Court in Banc are in words and figures as follows:

85 In the Supreme Court of Missouri, April Term, 1916.

No. 19318.

UNION PACIFIC RAILROAD COMPANY, Respondent,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, Appellant.

Motion by Respondent for Rehearing.

Now comes respondent and moves the Court to grant it a rehearing in the above cause and reinstate the judgment of the Circuit Court of Cole County, Missouri, in said cause, for the reasons that the following questions decisive of this case, and duly submitted by counsel for respondent, have been overlooked by the court, to-wit:—

I.

That the Public Service Act of the State of Missouri, as interpreted by this Court, denies to the respondent the equal protection of the law and due process of law, because it is permitted to come before said Commission only on condition that it waive all claim or defense that the said law is unconstitutional and void for the reason it is a burden upon interstate commerce and is an unlawful interference with interstate commerce and is a regulation and taxation of property outside of the State of Missouri, in violation of the Constitution of the United States; and deprives respondent of its property without due process of law, and denies to it the equal protection of the law; and that the law, as interpreted by this Court, makes such defenses subject to the condition that respondent forego any appearance and

86 hearing before said Commission and subject itself to the enormous penalties prescribed by the statute for such failure to go before said Public Service Commission and obtain such consent. By such interpretation, the Court compels the respondent to either go before such Commission and waive such defense, or ignore such Commission and subject itself to the enormous penalties denounced by said act for the violation thereof, and that said enormous penalties prevented the respondent, and each and all of its servants and employees, from issuing bonds in violation of said Act and then resorting to the courts for the purpose of determining the validity of such Act; that, in and by said Act, as interpreted by this Court, this Court has denied the respondent due process of law, and denied to it the equal protection of the law, in violation of Section 1, of the 14th Amendment to the Constitution of the United States; and respondent here and now invokes the protection of said 14th Amendment against the ruling herein that the respondent had waived its right to raise the validity of such Act, by applying to the Commission for its consent to issue the bonds mentioned and set forth in its petition filed with said Public Service Commission.

II.

That the Legislature of the State of Missouri in enacting said Public Service Commission law creating said Public Service Commission, so burdened the right to challenge the validity thereof in the courts, upon the condition, that if the respondent applies to said Commission for such consent, it estops itself from the right to challenge the constitutionality of said Act, or if it does not apply to said Commission for such consent, then it subjects itself to a prosecution for a violation of said Act and incurs the enormous penalties imposed for a failure to obtain such consent; and that in and by such enact-
87 ment of the law, as interpreted by this Court, the said law takes away from the respondent herein the equal protection of the law, and denies it due process of law in violation of the 14th Amendment to the Constitution of the United States.

III.

The court, in and by its interpretation of the Public Service Commission act, imposed upon the respondent herein the burden of either applying to the Public Service Commission of the State of Missouri for its consent to the issuance of the bonds, or undergo the severe pains and penalties imposed by said act, and imposed upon the respondent herein the burden of obtaining a judicial decision in a court of such questions (no prior hearing having ever been given) only upon the condition that if unsuccessful in its contention that the law was invalid, its agents, servants and employees must suffer the imprisonment prescribed by said act and it must pay the severe fines as provided in said act; and in and by such interpretation of the law the said act closes up all approaches to the courts and prevents any hearing upon the question whether the said Public Service Commission of Missouri has jurisdiction to hear the question involved and w-ether its acts are invalid or otherwise; and the law as interpreted by this Court indirectly prohibits the respondent herein from having a fair and impartial hearing of the validity of said act, and gives a hearing only upon the condition that if said act is held to be valid then it shall suffer the severe fines imposed upon it by said act and the imprisonment imposed upon its officers, agents and employees by said act; and such act, as so construed by this Court, is unconstitutional and void, in that it denies the respondent due process of law, and denies to it the equal protection of the law, in violation of the 14th Amendment to the Constitution of the United States.

88 IV.

The Public Service act of the State of Missouri, as construed by this court in said opinion, whereby jurisdiction is upheld in said Commission to authorize or disapprove the bonds issued by foreign corporations carrying on interstate commerce and having property in the State of Missouri used in such commerce, is an unlawful

interference with interstate commerce, and is a burden upon and regulation of interstate commerce, in violation of article 1 section 8 of the Constitution of the United States which prohibits any state from passing any act which in any wise prohibits or affects interstate commerce.

V.

The Public Service act of the State of Missouri, as construed by this Court, wherein it upholds the jurisdiction of the said commission to authorize or disapprove the issue of bonds by the respondent herein upon its property situated in the States of Iowa, Missouri, Nebraska, Kansas, Colorado, Wyoming and Utah, is a regulation of and a taxation of property outside of the State of Missouri, in violation of the Constitution of the United States, and deprives respondent of its property without due process of law, and denies to it the equal protection of the law.

VI.

Under the facts disclosed in this record, there was no estoppel, for the reason that the respondent would not have applied to the Public Service Commission for any order approving said bonds, but for the stringent provisions of the Public Service Commission act, and that in so applying to said Commission, it was acting under duress by reason of the fact that the said act had never been construed and that it was necessarily constrained to submit to said Commission rather than take the chances of suffering the enormous penalties imposed by said act, and that the enormous
89 penalties denounced for the violation of said act prevented the respondent, as alleged, or any of its servants or employees, from first resorting to a defense of said action in the courts of the state for the purpose of determining the validity of said Public Service act, and the respondent was thereby denied the equal protection of the law, and its property was liable to be taken without due process of law, because it is only allowed a hearing upon the unconstitutionality of the acts in question at the risk of being subjected to such enormous penalties resulting in the confiscation of its property and imprisonment of its officers and employees, if mistaken, and, rather than take such risk, the respondent applied to such Public Service Commission in order to avoid the possibilities of an imprisonment of its agents, servants and employees, and of having its property taken to pay the fines and penalties imposed upon it in case the courts should decide the law was valid; and in and by the terms of said act, as construed by this Court, the respondent herein was denied due process of law, and denied the equal protection of the law, in violation of the 14th Amendment to the Constitution of the United States.

VII.

Because the record in this case discloses that the said Public Service Commission act had not been interpreted and construed by

the Supreme Court of this state, and that no procedure existed by which respondent could obtain a construction of said act, and the jurisdiction of said Commission determined in advance, except by ignoring said Commission and ignoring the penalties, or first make application to the said Public Service Commission, as was done in said case; and that the record shows that to avoid said cloud upon the validity of said bonds and the possible penalties and imprisonment of its agents servants and employees, the respondent was compelled to make application, as aforesaid, to said Commission
90 for the approval of said bond issue, and that said application was not made voluntarily, but under compulsion and duress as aforesaid; that these facts were set up in the application for a rehearing before the Public Service Commission itself, and the procedure of respondent herein before said Public Service Commission showed that it was acting under duress, and because the Public Service Commission was asserting jurisdiction to declare null and void any bonds that were issued by respondent without its consent and permission, and necessarily would have to enforce the penalties for failure to obtain this order as provided in said act; and that, therefore, to hold that the respondent, under such facts and conditions, was estopped to question the validity of said Public Service act, denies it due process of law and denies it the equal protection of the law, in violation of the 14th Amendement to the Constitution of the United States.

VIII.

That, in denying the respondent a hearing upon the validity of the proceedings in this case, this Court denies respondent the right to a hearing upon the validity of said Public Service act, except upon a condition that it first subject itself to the risk of great loss of property and severe punishment imposed upon its officers, agents, servants and employees who authorized the issuance of the bonds on behalf of the respondent without such approval; and that in imposing upon respondent the condition that upon a failure to make good the claim or defense that the said act is unconstitutional and void, it must pay the penalties imposed by said act and its officers suffer the imprisonment therein specified, is a denial of the equal protection of the laws, in violation of the 14th Amendment to the Constitution of the United States.

91

IX.

The Public Service Act is unconstitutional and void, for the reason that the fee fixed by the law for making the inquiry takes the respondent's property without due process of law, in that the said fee fixed by the law, as construed by this Court, is for the purpose of reimbursing the State for the maintenance of the Commission, and is in no sense a tax within the ordinary meaning of that term; and, therefore, the only fees that could lawfully be charged would be a reasonable fee for the services actually rendered. The statute does

not provide for the payment of a reasonable fee to the Commission for the services actually rendered, and no officer of the State has authority to accept less than the statutory fee if tendered; and all fees exacted over and above a reasonable charge for such services takes the respondent's property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

Wherefore, for each and all of the foregoing reasons, the respondent herein moves the Court to grant it a rehearing; and, upon such rehearing, asks that the judgment of the Circuit Court of Cole county, Missouri, be affirmed.

Respectfully submitted.

R. W. BLAIR &
I. N. WATSON,
Attorneys for Respondent.

92 In the Supreme Court of Missouri, April Term, 1916.

No. 19318.

UNION PACIFIC RAILROAD COMPANY, Respondent,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, Appellant.

Motion to Transfer to Court in Banc.

Now comes respondent and moves the Court to transfer this cause to the court en banc, for the reason that a Federal question is involved in this case, and was duly presented in the briefs of the respondent herein to this Court; and that the Federal questions are presented to the Court in respondent's application for a rehearing, which entitles respondent to have this case transferred to the court en banc for a hearing, as provided by Section 4, Article 6, of the Constitution of the State of Missouri.

Wherefore, respondent prays the Court to transfer said cause to the court en banc, as by the Constitution in such cases made and provided.

R. W. BLAIR,
I. N. WATSON.
Attorneys for Respondent.

93 (19318.)

UNION PACIFIC RAILWAY COMPANY, Respondent,

vs.

PUBLIC SERVICE COMMISSION, Appellant.

Now at this day, there are presented by the said Union Pacific Railway Company, to the Honorable Archelaus M. Woodson, Chief

ustice of the Supreme Court of Missouri, in chambers, a petition for writ of error from the Supreme Court of the United States to the upreme Court of the State of Missouri, a writ of error from the upreme Court of the United States to the Supreme Court of the tate of Missouri, an assignment of errors, a citation to the said ppellant, citing and admonishing it to be and appear in the upreme Court of the United States within thirty days from and fter the date of said citation, and a bond in the sum of $2,000.00; hich said writ of error is allowed, said assignment of errors ordered led, said citation signed and ordered issued, and said bond approved nd ordered filed.

4 In the Supreme Court of the State of Missouri.

No. —.

PUBLIC SERVICE COMMISSION OF MISSOURI, Plaintiff in Error,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant in Error.

Petition for Writ of Error.

Comes now the above named defendant in error and complains hat in the record and proceedings had in said cause and also in the endition of the judgment in the above-entitled cause in the Supreme Court of the State of Missouri, on the 3rd day of July, 1916, mani- fest error hath happened, to the great damage of the said Union Pacific Railroad Company.

Wherefore, said Union Pacific Railroad Company prays for the llowance of a writ of error and for an order fixing the amount of ond, and for such other orders and process as may cause the same o be corrected by the Supreme Court of the United States.

UNION PACIFIC RAILROAD COMPANY,
By R. W. BLAIR &
I. N. WATSON,
Its Attorneys.

4½ [Endorsed:] No. 19,318. In the Supreme Court of the State of Missouri. Public Service Commission of Missouri, Plaintiff in Error, vs. Union Pacific Railroad Company, Defendant n Error. Petition for Writ of Error. Filed Sep. 18, 1916. J. D. Allen, Clerk.

95 In the Supreme Court of the State of Missouri.

No. —.

PUBLIC SERVICE COMMISSION OF MISSOURI, Plaintiff in Error,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant in Error.

Assignment of Errors.

Now comes Union Pacific Railroad Company, defendant in error, and assigns the following errors in the decision and judgment of the Supreme Court of the State of Missouri, to wit:

1. The Court erred in denying the contention of petitioner (plaintiff in error) that the assessment of fees herein involved made by the Missouri Public Service Commission constitutes, under the circumstances of this case, a regulation of, interference with and burden upon interstate commerce, a regulation and taxation of petitioner's properties and business outside the State of Missouri, and a deprivation of petitioner's property without due process of law, contrary to the provisions of the third clause of Section 8 of Article I of the Constitution of the United States and the provisions of the Fourteenth Amendment thereof.

2. The Court erred in finding that petitioner voluntarily submitted to the Missouri Public Service Commission and voluntarily elected to invoke the powers of said Commission, in that said finding is unsupported by any evidence, but on the contrary, the admitted facts establish that petitioner's submission to said Commission was

96 involuntary and under duress and compulsion.

Wherefore, the said Union Pacific Railroad Company asks by reason of each and every one of the foregoing assignments of error that the judgment and decision of the Supreme Court of the State of Missouri in the above entitled cause be reversed, and for naught held, and that it may be restored to all things which it has lost by the action and because of said judgment and decision, and may have and recover all its costs herein expended.

R. W. BLAIR &
I. N. WATSON,
Attorneys for Union Pacific Railroad Company.

96½ [Endorsed:] No. —. In the Supreme Court of the State of Missouri. Public Service Commission of Missouri, Plaintiff in Error, vs. Union Pacific Railroad Company, Defendant in Error. Assignment of Errors. Filed Sep. 18, 1916. J. D. Aller Clerk.

97 In the Supreme Court of the State of Missouri.

No. —.

THE PUBLIC SERVICE COMMISSION OF MISSOURI, Plaintiff in Error,

vs.

UNION PACIFIC RAILROAD COMPANY, Defendant in Error.

Order Allowing Writ of Error.

The above entitled matter coming on to be heard upon the petition of the defendant in error herein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter, it is

Ordered, that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States and that the bond presented by said petitioner be and the same is hereby approved. This 18th day of September, 1916.

A. M. WOODSON,
Chief Justice of the Supreme Court of the State of Missouri.

97½ [Endorsed:] No. 19,318. In the Supreme Court of the State of Missouri. The Public Service Commission of Missouri, Plaintiff in Error, vs. Union Pacific Railroad Company, Defendant in Error. Order Allowing Writ of Eror. Filed Sep. 18, 1916. J. D. Allen, Clerk.

98 In the Supreme Court of the United States, October Term, 1916.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,

vs.

PUBLIC SERVICE COMMISSION OF MISSOURI, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Missouri:

Because in the record and proceedings, as also in the rendition of a judgment on a plea which is in the said Supreme Court of the State of Missouri before you, being the highest court of law and equity

of the said state in which a decision could be had in a suit between the Union Pacific Railroad Company, Respondent, and the Public Service Commission of Missouri, Appellant, wherein was drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or authority exercised under said state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption especially set up or claimed under said clause of the Constitution, treaty, statute or commission, a manifest error hath happened to the great damage of the Union Pacific Railroad Company, as by their complaint appears.

99 We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, after judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 18th day of October, 1916 next, to the said Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the said Supreme Court, the 18th day of September, in the year of our Lord, One Thousand Nine Hundred and Sixteen.

[Seal of the United States District Court of Missouri, Western Division, Eastern District.]

JOHN B. WARNER, *Clerk*,
By C. J. MURRAY, *D. C.*

99½ [Endorsed:] 19318. In the Supreme Court of the United States, October Term, 1916. Union Pacific Railroad Company, Plaintiff in Error, vs. Public Service Commission of Missouri, Defendant in Error. Writ of Error. Filed Sep. 18, 1916. J. D. Allen, Clerk.

100 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Public Service Commission of Missouri, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, within thirty

days from date hereof, pursuant to a writ of error filed with the Clerk of the Supreme Court of Missouri, wherein the Union Pacific Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Archelaus M. Woodson, Chief Justice of Missouri this 18th day of September, in the year of our Lord one thousand nine hundred and sixteen.

A. M. WOODSON,
Chief Justice Supreme Court of Missouri.

Service of a copy of the foregoing citation hereby acknowledged this 27th day of September, 1916.

ALEX Z. PATTERSON,
General Counsel Missouri
Public Service Commission.

100½ [Endorsed:] 19318. In the Supreme Court of the State of Missouri. Union Pacific Railroad Company, Plaintiff in Error, vs. Public Service Commission of Missouri, Defendant in Error. Citation. Copy of citation to be served on Z. T. Patterson, Counsel, Public Service Commission. Filed Sep. 18, 1916. J. D. Allen, Clerk.

101 In the Supreme Court of the State of Missouri.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,

vs.

PUBLIC SERVICE COMMISSION OF MISSOURI, Defendant in Error.

Bond for Prosecution of Writ of Error to the Supreme Court of the United States.

Know all men by these presents that we, The Union Pacific Railroad Company, and H. G. Kaill, and E. F. Swinney and H. T. Abernathy are held and firmly bound unto the above Public Service Commission of Missouri in the sum of Two Thousand Dollars ($2,000.00) to be paid to the said Public Service Commission, for the payment of which well and truly to be made, we bind ourselves and each of us, and each of our heirs, executors, and administrators, jointly and severally firmly by these presents.

Sealed with our seals, and dated this 16th day of September, in the year of our Lord, one thousand nine hundred and sixteen.

Whereas, the above named Union Pacific Railroad Company has prosecuted a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Missouri to reverse a

judgment and decree rendered by the Judges of the Supreme Court of the State of Missouri in the above entitled cause.

Now therefore, the condition of this obligation is such that, if the above named Union Pacific Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs, if they fail to make said writ of error good, then this obligation shall be void; otherwise, the same shall be and remain in full force and effect.

UNION PACIFIC RAILROAD COMPANY,
By R. W. BLAIR &
I. N. WATSON,
Its Attorneys.
E. F. SWINNEY.
H. T. ABERNATHY.

H. G. KAILL.

Bond approved this 18th day of September, 1916.

A. M. WOODSON,
Chief Justice.

102 In the Supreme Court of the State of Missouri.

No. 19318.

PUBLIC SERVICE COMMISSION OF MISSOURI, Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, Respondent.

Order.

Now on this 16th day of October, 1916, for good — shown, the time heretofore given the Union Pacific Railroad Company, Plaintiff in Error, in which to file a transcript of all proceedings of this court in the Supreme Court of the United States is hereby extended to the Fifteenth day of November, 1916, and the time for the Clerk of this Court to make return of transcript in this case to the Supreme Court of the United States is enlarged, and the time extended until November 15, 1916.

A. M. WOODSON,
Chief Justice.

103 [Endorsed:] No. 19318. In the Supreme Court of the State of Missouri. Public Service Commission of Missouri, Appellant, vs. Union Pacific Railroad Company, Respondent. Order extending time for filing transcript in U. S. Sup. Ct. to Nov. 15, 1916, by Woodson, C. J. Filed Oct. 16, 1914. J. D. Allen, Clerk. Watson, Gage & Watson, Attorneys for Respondent.

104 STATE OF MISSOURI, *sct:*

I, J. D. Allen, Clerk of the Supreme Court of the State of Missouri, hereby certify that the above and foregoing is a true and complete transcript of the record and proceedings in the case of Union Pacific Railroad Company, Plaintiff in Error, vs. Public Service Commission of Missouri, Defendant in Error, as called for by the Præcipe, with the exception that the printed Abstract of the Record, on which the case was tried in this Court, was used instead of the entire original record of the Court below, as called for in the præcipe: Also the extracts from the Charter or Articles of Incorporation are omitted because the Charter was not filed in this Court in these proceedings and is not in my possession.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of the State of Missouri at my office in the City of Jefferson, this 24th day of October, 1916.

[Seal of the Supreme Court of Missouri.]

J. D. ALLEN,
Clerk of the Supreme Court of the State of Missouri.

Endorsed on cover: File No. 25,596. Missouri Supreme Court. Term No. 766. Union Pacific Railroad Company, plaintiff in error, vs. Public Service Commission of Missouri. Filed November 6th, 1916. File No. 25,596.

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Supreme Court of the United States.

OCTOBER TERM, 1918.

NO. 65

UNION PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI,
Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF OF PLAINTIFF IN ERROR.

Statement of Facts.

On September 4, 1914, plaintiff in error, a corporation of Utah, owned and operated lines of railroad extending from Council Bluffs, Iowa, through the states of Iowa, Nebraska and Wyoming to Ogden, Utah; and from Kansas City, Missouri, through the states of Kansas and Colorado to a connection with the first named line at Cheyenne, Wyoming, aggregating 3560.41 miles of which .51 of a mile was located in the state of Missouri (2).*

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* Figures in parenthesis indicate page of record.

The book value of its entire railroad property as of June 30, 1914, was $281,057,730.06. The estimated value of that part of its railroad in the state of Missouri was $3,058,893.29, or slightly more than one per cent of the total (2).

Plaintiff in error was engaged in the transportation of interstate commerce to and from the state of Missouri for many years prior to the enactment of the Public Service Law of that state, and all of its business transacted in Missouri was interstate in character (3). No purely state business was handled by it in that state.

On September 4, 1914, plaintiff in error applied to the Public Service Commission of Missouri, in accordance with the laws of that state, for a certificate authorizing it to issue bonds under the terms of its First Lien and Refunding Mortgage (38 to 41) which was a lien upon its entire 3560.41 miles of railroad (3), in the sum of $31,848,900.00, to reimburse it for expenditures made out of its treasury for new rolling stock and betterments (3, 7). Of the amount thus expended, $124,930.38, or four-tenths of one per cent, were paid for improvements in Missouri (8), the balance having been expended in the other states through which the lines of plaintiff in error run.

The portions of the Missouri Public Service Act relating to the Application read as follows (Public Service Act of Missouri, 1913):

> "Sec. 21. *Fees to be charged and collected by the commission.* The commission shall charge and collect the following fees: . . . for certificate authorizing an issue of bonds, notes or other evidences of indebtedness, one dollar for each thou-

sand dollars of the face value of the authorized issue, or fraction thereof, up to one million dollars, and fifty cents for each one thousand dollars over one million dollars and up to ten million dollars, and twenty-five cents for each one thousand dollars over ten million dollars, with a minimum fee in any case of two hundred and fifty dollars: Provided, that no fee shall be charged when such issue is made for the purpose of guaranteeing, taking over, refunding, discharging or retiring any bond, note or other evidence of indebtedness up to the amount of the issue guaranteed, taken over, refunded, discharged or retired." (Laws 1913, p. 567).

"Sec. 54. *Right to issue stocks, bonds and notes is subject to regulation by state.*—The power of railroad corporations, street railroad corporations and common carrier to issue stocks, and bonds, notes and other evidences of indebtedness and to create liens upon their property situated in this state is a special privilege, the right of supervision, regulation, restriction, and control of which is and shall continue to be vested in the state, and such power shall be exercised as provided by law and under such rules and regulations as the commission may prescribe." (Laws 1913, p. 592.)

"Sec. 55. *Transfer of franchises or stocks.* No railroad corporation, street railroad corporation or common carrier shall hereafter sell, lease, assign, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its railroad or street railroad necessary or useful in the perform-

ance of its duties to the public or any franchise or permit or any right thereunder, nor by any means whatsoever, direct or indirect, merge or consolidate such railroad or street railroad, franchise or permit, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing the same shall be void. The permission and approval of the commission to the exercise of a franchise or permit under this act, or the sale, assignment, lease, transfer, mortgage or other disposition or encumbrance of a franchise or permit under this section, shall not be construed to revive or validate any lapsed or invalid franchise or permit, or to enlarge or add to the powers or privileges contained in the grants of any franchise or permit, or to waive any forfeiture. Nothing in this subsection contained shall be construed to prevent the sale, lease or other disposition by any corporation, person or public utility of a class designated in this subsection of property which is not necessary or useful in the performance of its duties to the public, and any sale of its property by such corporation, person or public utility shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser of such property in good faith for value." (Laws 1913, pp. 592-593).

"Sec. 57. *Approval of issues of stocks, bonds and other forms of indebtedness.*—A common carrier, railroad corporation or street railroad corporation, organized or existing, or hereafter incorporated, under or by virtue of the laws of the state of Missouri, may issue stocks, bonds, notes or other evidences of indebtedness payable at periods of more than twelve months after the date thereof, when necessary for the acquisition of property, the construction, completion, extension or improvement of its facilities, or for the improvement or maintenance of its service or for the discharge or lawful refunding of its obligations or for the reimbursement of moneys actually expended from income or from any other moneys in the treasury of the corporation not secured by or obtained from the issue of stocks, bonds, notes or other evidence of indebtedness of such corporation. * * *" (Laws 1913, p. 594.)

"Sec. 59. Sub-division 2: All stock, and every bond, note or evidence of indebtedness, of a railroad corporation, street railroad corporation or common carrier issued without an order of the commission authorizing the same then in effect shall be void, and likewise all stock, and every bond, note or other evidence of indebtedness, of a railroad corporation, street railroad corporation or common carrier issued with the authorization of the commission, but not conforming in its provisions, to the provisions, if any, which it is required by the order of authorization of the commission to contain, shall be void; but no failure in any other respect to comply with the terms or conditions of the order of

authorization of the commission shall render void any stock, or any bond, note or other evidence of indebtedness, except as to a corporation or person taking the same otherwise than in good faith and for value and without actual notice." (Laws 1913, p. 596.)

The penalties prescribed for issuing bonds without the consent of the Commission are found in sub-division 4 of Section 58, p. 596, Session Laws of 1913, and are in substance that such violation of the law shall be treated as a felony and shall subject the offender to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for not less than two years nor more than five years, or by both such fine and imprisonment.

After a hearing before the Commission (9) the application was granted (30), and a fee of $10,962.25 charged for the certificate (30). The fee was based on a rate of $1.00 per $1,000.00 for the first $1,000,000.00 of the proposed bond issue, 50c per $1,000.00 for the next $9,000,000.00, and 25c per $1,000.00 for the remainder; (see Sec. 21, Public Service Act, *supra*) the assessment of fees being based upon the entire bond issue of the railroad company representing its total mileage in the states above mentioned.

The order of the Commission was accepted by the railroad company and the fee paid under protest. (33-34). The filing of the protest was coincident with the acceptance of the order and the payment of the fee. A copy of the protest follows (34):

Protest.

"Union Pacific Railroad Company hereby pays under protest the sum of $10,962.25, being the

amount of fees assessed and demanded for certificate authorizing the issue by said company of $31,848,900, face value, of additional first lien and refunding mortgage bonds.

"Protest is made upon the grounds:

"1st. That said assessment is not authorized by the Public Service Commission Law of the State of Missouri, approved March 17, 1913, under which it purports to have been made; and,

"2d. That if such assessment is authorized by said statute, said statute and said assessment are in conflict with the Constitution of the United States and the amendments thereto, in that they impose a burden and tax on the interstate business of said company, and a burden and tax upon said company's property beyond the limits of the State of Missouri.

"And you are hereby notified that this payment is made involuntarily and under duress, and without waiving the assertion and claim that the assessment is illegal, unauthorized and void, and such payment is made solely to escape the penalties prescribed and to prevent the revocation of the certificate issued herein, and to enable said company to issue and sell the bonds referred to in said certificate which are necessary to the carrying on of the business as a common carrier.

"You are further notified that a petition for rehearing of the decision fixing the fees herein at the sum of ten thousand nine hundred sixty-two dollars and twenty-five cents ($10,962.25), will be immediately filed and such further proceedings will be taken as are necessary to recover such sum less the sum of one hundred and twenty-five dollars ($125.00) this day tendered as the legal fees herein, and you are further respectfully notified not to disburse the money hereby paid until the legality of the fees are finally determined."

A petition for rehearing was presented to the Commission (34) but was overruled (38). Thereupon a petition for Writ of Certiorari or Review was filed in the Circuit Court of Cole county, Missouri (2). The case was tried upon the petition and a transcript of the proceedings before the Commission. The judgment of the court was that the fee charged by the Public Service Commission was unreasonable and unlawful and that $250.00, being the minimum amount fixed by statute, was the lawful fee to be charged (5).

Upon appeal by the Public Service Commission to the Supreme Court of Missouri the judgment of the Circuit Court was reversed (41), Division No. 1 of the Supreme Court holding that the fee charged was valid and reasonable, and that the railroad company having applied for a certificate to the Public Service Commission authorizing the issuance of the bonds in question was estopped to deny its authority or to question the fee fixed by statute. The opinion of the court will be found on page 42 of the record, and in 268 Mo. 641. Also in 187 S. W. 827. It will be observed that the lower court was directed to affirm the action of the Public Service Commission in assessing the fee at the sum of $10,962.25 (47).

It thus appears that the controversy involved in this appeal is as to whether under the facts stated, a fee of $10,962.25, based upon a rate applied to the entire issue of bonds representing the company's total mileage as an interstate carrier, and necessary for the making of betterments on its property as a whole, is reasonable and lawful and can be sustained under the commerce clause of the Federal Constitution, or the Fourteenth Amendment.

It should probably be stated that after the decision of the Supreme Court of Missouri just referred to, and on November 15, 1916, the Public Service Commission of Missouri brought suit against Union Pacific Railroad Company in the Circuit Court of Jackson County, Missouri, to enjoin it from making a further issue of bonds under the above mentioned mortgage for a purpose precisely similar to the one under which the bonds involved in this case were issued without the consent of the Commission. The Circuit Court refused the injunction and its judgment was affirmed upon appeal to the Supreme Court of Missouri. The decision was by the court *In Banc* and is reported in 271 Mo. 258. Also in 197 S. W. 39. The opinion was written by Bond, J. It was concurred in by Walker, J. Faris, Woodson and Williams, JJ., concurred in the result. Graves, CJ., concurred in a separate opinion. Blair, J., dissented. Although it is impossible to state the grounds upon which three of the judges concurred in the result, the only reasonable inference from the entire proceding is that the Court was of the opinion that the statutes of Missouri did not apply to a case like that of the Union Pacific. At the end of the Opinion the Court makes this statement: "Having held that under the facts "shown in this record respondents' transaction was not "within the purview of the statutes, the further ques- "tion as to their validity is wholly academic."

SPECIFICATION OF ERRORS.

The Union Pacific Railroad Company, plaintiff in error, assigns the following errors in the decision of the Supreme Court of Missouri:

1. The Court erred in denying the contention of plaintiff in error that the assessment of fees herein

involved made by the Missouri Public Service Commission constitutes, under the circumstances of this case, a regulation of, interference with and burden upon interstate commerce, a regulation and taxation of petitioner's properties and business outside the State of Missouri, and a deprivation of petitioner's property without due process of law, contrary to the provisions of the third clause of Section 8 of Article I of the Constitution of the United States and the provisions of the Fourteenth Amendment thereof.

2. The Court erred in finding that plaintiff in error voluntarily submitted to the Missouri Public Service Commission and voluntarily elected to invoke the powers of said Commission, in that said finding is unsupported by any evidence, but on the contrary, the admitted facts establish that plaintiff in error's submission to said Commission was involuntary and under duress and compulsion.

The foregoing federal questions were raised in the Motion for Rehearing filed with the Commission (37); in the Protest filed with the Commission (34); in the Petition for Writ of Certiorari or Review filed by plaintiff in error with the Circuit court of Cole County (4); and in the proceedings in the Supreme Court of Missouri (43 to 47; 48 to 52).

BRIEF OF THE ARGUMENT

As the facts in both cases decided by the Supreme Court of Missouri were substantially the same, it is reasonable to assume, in view of the later decision, that the Public Service Commission had no jurisdiction over the bond issue in question, and that it could have been

lawfully made without the consent of the Commission. However, at the time the application was made, September 4, 1914, the Commission was asserting jurisdiction, the statute *apparently* gave it jurisdiction, and the railroad company was justified in believing that if the Commission's consent were not obtained the issuance of the bonds might subject it to the severe penalties of the law, and that such a cloud would be cast upon the validity of the bonds that they would be unmarketable.

That the Commission was insisting upon its authority in the premises was alleged by plaintiff in error in its Petition for Writ of Certiorari or Review (3) and in its Motion for a Rehearing before the Commission (36). These allegations were not denied and stand admitted upon the record. Furthermore the Commission itself in its Motion for New Trial filed in the Circuit Court of Cole county, asserted its jurisdiction in respect to the authorization of bond issues (32). Its position on this subject is confirmed by the subsequent action taken in the Circuit Court of Jackson county, Missouri, to enjoin Union Pacific Railroad Company from issuing bonds without its consent.

That plaintiff in error sought the consent of the Commission because of the cloud upon the validity of the bonds which would exist if the Commission's consent were not obtained, and because of the severe penalties which might be inflicted upon it, also stands admitted upon the record. It is alleged in unequivocal terms by plaintiff in error in its Petition for Writ of Certiorari or Review (3), in its protest accompanying the payment of the fee (34), and in its Motion for Rehearing filed with the Commission (36-37); and at no place in the record are these allegations denied.

That the issuance of the bonds was requisite in order to raise money for the necessary upkeep of the property was alleged in the Petition as well as the Petition for Rehearing filed with the Commission (8, 33) and is not denied. In fact the necessity for issuing the bonds is set forth in the order of the Commission itself (30).

The foregoing being true, it follows that the payment of the $10,962.25 fee was not made voluntarily, but under compulsion and duress.

Brown, C., who wrote the opinion of the Supreme Court of Missouri, states the claim of the railroad company to the effect that it would not have applied for the order but for the stringent provisions of the Public Service Act, and remarks that: "This may be true, but we can see in the record many reasons why it might have desired the endorsement of the state as to this security even had no penalty been imposed by the Act." He then proceeds to show why it would be desirable for a railroad corporation of Utah with its property already encumbered with a large mortgage, to have a new issue of mortgage bonds, which would be a lien upon the property of the company in Missouri, endorsed by the Public Service Commission of that state. In concluding the discussion of this subject the Court says: "Under these circumstances who shall say that it was not of interest to the purchaser of these securities as well as to the state whether these betterments had been paid for from capital already applicable to that use or from earnings, and the opinion of the Commission, expressed in its order, that the bonds came fairly within the provision of the mortgage, would not be of advantage in their disposition?"

It will be noted that in expressing the foregoing views the Court proceeds upon the assumption that no penalties were to be imposed for a violation of the Act. This was for the undoubted purpose of emphasizing the value of the Commission's finding from a purely business standpoint. It is a fair inference from all that is said that the Court was also of the opinion that the certificate of the Commission would be equally valuable even though the law did not formally vest that body with jurisdiction to pass upon the regularity of bond issues.

The Court states, then proceeds to ignore, the claim of the railroad company (which is supported by uncontradicted allegations in the record), and by a process of reasoning, purely speculative, to show why it was to the interest of the railroad company to have a finding of the Commission certifying that "the bonds came fairly within the provision of the mortgage."

We submit that there is nothing in the record to justify the conclusion of the Court. The reasons it gives for suggesting that the railroad company sought the order of the Commission as a matter of self interest, independent of any motives based upon the penalties or the requirements of the statute, merely to give standing to the securities it was about to issue, are not based upon the record, but contrary to it. Furthermore, it should require no argument to demonstrate that plaintiff in error would not have been willing to pay the Public Service Commission as mere individuals without jurisdiction of the subject matter, a fee of more than $10,000.00 to find that the proposed bond issue was within the terms of the mortgage.

Upon the proposition that the payment of the fee was involuntary and under duress, see:

Atchison, Topeka & Santa Fe Railway Co. v. O'Connor, 223 U. S. 280.

Swift Company v. United States, 111 U. S. 22.

Robertson v. Frank Bros. Co., 132 U. S. 17.

Westlake & Button v. City of St. Louis, 77 Mo. 47.

St. Louis Brewing Assn. v. St. Louis, 140 Mo. 419.

American Brewing Assn. v. St. Louis, 187 Mo. 637.

Scottish Union & Nat. Ins. Co. v. Herriott, 109 Ia., 606.

But regardless of the motives which caused the railroad company to apply for the order of the Commission, the Supreme Court of Missouri was of the opinion that if for any reason the railroad company considered it necessary to secure the certificate of the Commission, it should as a necessary incident to such action, be required to pay the fee fixed by statute, viz., $10,962.25.

The views of the Court upon this subject are epitomized in a sentence following the review of authorities cited by the railroad company. It reads as follows: "It is plain that such cases have no relation to a case in which it is sought to avoid paying to the state the statutory fee for services performed at the request of the complaining party, relying upon its own judgment as to their legal necessity or desirability."

Apparently the Court was of the opinion that if a corporation sought and accepted an order of the Com-

mission it must be paid for at the statutory rate ever though it be admitted that such action was taken because of the fear of penalties and the cloud upon the title. In other words the Court takes the position that if a corporation wishes to escape payment of the statutory fees it must not *under any circumstances, or for any reason,* accept an order of the Commission. This we submit is not the law.

In holding that the fee was indivisible the Supreme Court of Missouri was undoubtedly led to this conclusion from the fact that it had determined that a party seeking an order of the Commission, regardless of the reasons inducing it to do so, necessarily made the application voluntarily, and therefore had no right to question the amount of the fee. If it should be finally determined that the payment of the fee was involuntary and made under duress, it is not at all improbable that the Supreme Court of Missouri, following well established law in that state, would hold that only that portion of the fee should be paid which could properly be allocated to the state of Missouri.

In the case of *Stanley v. Wabash R. R. Co.,* 100 Mo. 435, it was held that, "A statute will not be presumed to have been intended by the legislature to have any extra territorial force, when such intention would make it void." (Syllabus).

In that case suit was brought to recover an overpayment of freight charges for the transportation of sheep from La Plata, Missouri, to East St. Louis, Illinois, under a statute of Missouri which in terms included interstate as well as state shipments. The Court held that if, as decided by the trial Court, the statute under discussion could be held to apply to interstate

shipments, then it was an attempted regulation of commerce between the states, and violated Article I, Section 8, of the Constitution of the United States. The Court also held, quoting Cooley on Constitutional Limitations, 151, that, "The legislative authority of every state must spend its force within the territorial limits of the state," and limited the construction of the statute accordingly.

To the same effect is *Connell v. Western Union Telegraph Co.*, 108 Mo. 459; *Wagner v. Western Union Telegraph Co.*, 152 Mo. App. 369. See also *St. Louis & S. W. Ry. Co. v. Arkansas*, 235 U. S. 350.

There was nothing inconsistent in the action of plaintiff in error in taking the benefit of the order and at the same time questioning the amount of the fee. Plaintiff in error does not object to the payment of a reasonable fee based upon any fair theory which will differentiate between that portion of the bond issue applicable to Missouri and that portion which pertains to the other states through which its railroad runs. It is willing to pay the minimum fee of $250.00 in accordance with the judgment of the Circuit Court. But it is not willing to pay a fee of more than $10,000.00 based upon a rate which is applied to the entire issue of bonds, most of which is to be used in connection with improvements made in states other than Missouri.

If the fee is held to be indivisible it is unconstitutional.

That a charge based upon a rate applicable to the entire bond issue of a railroad company, including property outside as well as inside the state is an illegal burdening of interstate commerce, as well as a depriva-

tion of property without due process of law, is well established by the following cases:

Western Union Telegraph Co. v. Kansas, 216 U. S. 1.

Looney v. Crane, 245 U. S. 178.

International Paper Co. v. Massachusetts, 246 U. S. 135.

If the theory upon which this case must be presented is that the Supreme Court of Missouri has held the rate to be indivisible, and applicable to all the securities of the railroad company which are to be issued and which represent its mileage outside as well as inside of the state, then we submit that the statute is in violation of the commerce section of the Federal Constitution and the Fourteenth Amendment, and make the claim upon the strength of the authorities last cited.

In *Western Union v. Kansas, supra*, the Court held void, as in conflict with the interstate commerce and due process clauses, a Kansas statute requiring foreign corporations to take out a certificate of authority for *local* business and to pay a graduated license fee based upon their entire capital stock. The Western Union Telegraph Co., doing both local and interstate business in the State, complied with all the formal requirements entitling it to a certificate but declined to pay the license fee, and the State brought a proceeding to oust it from local business. In *form* the statute was expressly limited to *local* business; it prescribed an application for authority and the payment of fees only as a condition to the right to transact *local* business. Counsel for the State contended that the granting of a local franchise to foreign corporations was exclusively a State concern

and that this was a local police regulation. The Court said, p. 26: "The authorities cited show that the Court has guarded with both diligence and firmness the freedom of interstate commerce against hostile state or local action, as such action has been manifested by regulations, operating, in some instances, directly, in others, indirectly, upon the means or instruments employed in that commerce. This has been done without violating the principle that an interstate carrier, entering a State for purposes of its business, is subject to local regulations that in their essence and purpose only incidentally affect interstate commerce, but are established in good faith for the protection, safety, comfort and convenience of the people, are not in themselves in any real, just sense an obstruction to or in conflict with the substantial rights of those engaged in interstate commerce, but are referable to the police powers of the State, and to be respected until Congress covers the subject by legislation." But it was nevertheless held that the *effect* of the statute in its imposition of a fee based on the entire capital was to burden and tax the company's interstate business and its property located or used outside of the State of Kansas, since its entire capital represented all of its business and property both within and without the State. It was said, pp. 31 and 32: "So, in the case now before us, the exaction, as a condition of the privilege of continuing to do or doing local business in Kansas, that the Telegraph Company shall pay a *given per cent of its authorized capital stock,* is, for every practical purpose, a tax both on the company's local business in Kansas, and on its interstate business or on the privilege of doing interstate business; for, the

statute, by its necessary operation, will accomplish precisely the result that would have been accomplished had it been made *in express words*, a condition of doing local business that the Telegraph Company should submit to taxation upon both its interstate *and* intrastate business and upon its interests and property everywhere, as represented by its capital stock."

The case of *International Paper Co. v. Commonwealth of Massachusetts, supra*, was a suit by a New York corporation to recover the amount of an excise tax assessed against it in Massachusetts for the year 1915, and paid under protest, the right of recovery being predicated on the asserted invalidity of the tax under the commerce clause of the constitution, and the due process clause of the Fourteenth Amendment. The authorized capital stock of the company on which the tax was computed is $45,000,000. Its total assets are not less than $39,000,000 or $40,000,000, of which not more than 1¾ per cent are located or invested in Massachusetts. Its authorized and actual business is manufacturing and selling paper, in which connection it operates 23 mills—1 in Massachusetts and 22 in other states. The output of its mills is sold by it in both interstate and intrastate commerce, principally the former. In Massachusetts it maintains a selling office where two salesmen, with a bookkeeping and clerical force, negotiate sales of a part of the output to consumers in the New England States, subject to the approval of the home office in New York. About 86 per cent of the sales negotiated through this selling office are in interstate commerce and the remainder are local to Massachusetts. The sales are made largely through long-term contracts with proprietors of newspapers

whereby the company engages to supply their needs from its mills and from the output in transit at the time. No stock of goods is kept on hand in Massachusetts from which current sales are made. The executive and financial offices of the company are in New York, and none of its corporate or business activities are carried on in Massachusetts save as is here indicated. It pays local property taxes in Massachusetts on its real and personal property located there. In 1915 the assessed value of such property was $472,000, and the tax paid thereon was $8,118. The tax in question was in addition to the property tax and amounted to $5,500. It was imposed, so the State Court holds, as an annual excise for the privilege of doing a local business within the State.

In the consideration of the case the principles laid down in the *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, and other cases limiting the power of the state in respect of license fees or excise taxes imposed on foreign corporations doing interstate as well as local business were re-stated and reaffirmed. The Court held that a license fee or excise of a given per cent of the par value of the entire authorized capital stock of a foreign corporation doing both local and interstate business and owning property in several states, tested, as it must be, by its essential and practical operation rather than by its form or local characterization, was a tax on the entire business and property of the corporation and was unconstitutional and void, both as an illegal burdening of interstate commerce and as a deprivation of property without due process of law.

The case of *Looney v. Crane Company, supra*, involved the validity of a Texas statute which, as con-

strued by the state court of last resort, required a foreign corporation as a condition of engaging in local business in that State to pay a permit tax based on its entire authorized capital and a franchise tax based on its outstanding capital plus its surplus and undivided profits. The foreign corporation complaining of these taxes was a manufacturing and trading company extensively engaged in interstate and local commerce, principally the former, in several States, including Texas. It maintained an agency in that State and had a large supply depot at one point therein and a warehouse at another. Of its gross sales and receipts for the year preceding the suit not more than 2½ per cent—$1,019,750—had any relation to Texas and of this approximately one-half was interstate in character. The assessed value of its property in the State was $301,179, upon which it paid the usual ad valorem tax.

Applying and reaffirming the doctrine in the case of *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, this Court unanimously pronounced the Texas statute invalid as placing direct burdens on interstate commerce and taxing property and rights which were wholly beyond the confines of the state and not subject to its jurisdiction.

Conclusion.

The position of plaintiff in error may be briefly stated as follows:

It did not "covet" the order in the sense intimated by the Supreme Court of Missouri, but believed that the statutes of Missouri, under which the Commission asserted the power to act, required it to submit to the jurisdiction of that body. It was necessary to issue the

bonds in order to raise funds with which to buy rolling stock and make essential improvements upon its property. In order therefore to avoid the severe penalties of the law and make its bonds marketable plaintiff in error accepted the Commission's order and paid the fee demanded under protest, notifying the Commission at the same time that suitable proceedings would be taken to recover all of the fee except the sum of $125.00, which was admitted to be a reasonable amount to charge. Plaintiff in error did not seek to take advantage of the Commission or to secure something for nothing, but as a corporation engaged extensively in interstate commerce, conceived it to be its duty to defend itself against what it believed to be an unjust and illegal charge.

Plaintiff in error submits that the judgment of the Supreme Court of Missouri should be reversed with instructions to affirm the judgment of the Circuit Court of Cole County, Missouri, fixing the fee to be paid at $250.00, if the Supreme Court of Missouri holds the fee to be divisible; or if the Supreme Court of Missouri holds the fee to be indivisible, with instructions to that Court to direct the Circuit Court of Cole County to set aside and hold for naught the fee of $10,962.25 as in violation of the Constitution of the United States.

Respectfully submitted,

HENRY W. CLARK AND
N. H. LOOMIS,
Attorneys for Plaintiff in Error.

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JAMES D. MAHER
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 96.

UNION PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

EDWARD W. WHITE,
Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 65.

UNION PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, DEFENDANT IN ERROR.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

REPLY BRIEF OF PLAINTIFF IN ERROR.

Defendant in error relies upon the sole proposition that plaintiff in error having accepted the order of the Commission is estopped to deny the validity of the fee charged by it. It admits the necessity of issuing the bonds to enable defendant in error as an interstate carrier to maintain its property and carry on its business. It admits that it asserted jurisdiction over the bond issue under the laws of Missouri, and that under those laws the railroad company and its offi-

cials would be subjected to heavy penalties if the bonds were issued without the consent of the Commission.

It is contended, however, by defendant in error, that the penalties would not have attached during the time the railroad company was in good faith prosecuting a suit to review the Commission's order, and suggests the two following courses which plaintiff in error might have pursued in order to test the validity of the fees charged by the Commission (p. 13, brief of defendant in error):

> 1. "Therefore, plaintiff in error could have asserted from the outset that the Public Service Commission possessed no power to regulate the issuance of its securities and could have refused to accept the order prescribing the amount and the manner of issuance of its bonds, and by prosecution of a proceeding to review that order, its lawfulness could have been ascertained, the Railroad Company incurring no liability to penalties or forfeitures for non-observance thereof.
>
> 2. "Or, plaintiff in error could have disregarded the apparent authority of the Commission, and announced its intention to issue bonds, without submitting an application for approval thereof, whereupon the validity of the Public Service Commission Law could have been tested in an injunction suit brought by the Commission."

Conceding, for purposes of argument, that the procedure outlined in the first paragraph was practicable, and the suggestions of counsel had been followed, the result would have been an unaccepted order, or the equivalent of an order without life or vitality. It will be observed that the railroad company was required to notify the Commission within ten days whether the order was accepted and would be obeyed

(31). With no order in existence to be violated, the provisions of Sec. 106, quoted on page 4 of the brief of defendant in error, would not apply, and if in that state of the case the bonds had been issued it would have been done in violation of subdivisions 3 and 4 of Section 59, p. 596, Session Laws of Missouri (p. 6 of our main brief), and not in violation of any order of the Commission. In other words the law would have been violated, not because the bonds were issued in conflict with an order of the Commission, but because the statute was broken by the issuance of bonds without an order of the Commission permitting it to be done.

In order to take advantage of counsel's construction of the provisions of Sec. 106, italicized in the brief of defendant in error (p. 4), it would have been necessary to secure an order of the Commission which would have been violated by the issuance of bonds. But such a procedure would not apply in a case where the bonds were to be issued in accordance with the terms of the order.

In the case under consideration the railroad company found it necessary to issue bonds which could be marketed. In order to do so it was necessary to secure the consent of the Commission, pay the fee demanded by it, and issue the bonds in accordance with the terms prescribed by the Commission. If the fee demanded had not been paid the order would undoubtedly have been rescinded; if an acceptance of the order had been refused, the very object sought to be attained by the issuance of an order would have been lost, and the cloud upon the title of the bonds would have remained until a final decision from the courts had been obtained. If bonds had been issued after the railroad company had refused to accept the Commission's order or to pay the fee, and before a final decision as to the constitutionality or applicability of the law had been obtained, the penalties of the law would have seemed very imminent.

If the course pursued in the second paragraph had been followed, and the bonds had been issued regardless of the law and the asserted jurisdiction of the Public Service Commission, the railroad company and its officials would certainly have run the apparent risk of being subjected to the heavy penalties of the law. It had no assurance that the Commission would test the question by injunction proceedings rather than by instituting a criminal prosecution.

The fact that the Supreme Court of Missouri afterwards declared that the law was not applicable to a case similar to that of the Union Pacific does not meet the situation, because the railroad company had no means of knowing what the final decision of the Supreme Court of Missouri would be, and at the time the instant proceedings were instituted did not believe itself justified in assuming the extraordinary risk of guessing what the result would be and of issuing the bonds. After the decision of the Supreme Court of Missouri now being considered was handed down, the railroad company sought another method of testing the power of the Missouri Public Utilities Commission to regulate the issuance of its securities. Fortunately the Commission brought injunction proceedings to settle the question and the case was decided in accordance with the contention of the railroad company (p. 9 of our main brief). But the Commission was not required to follow that course and the railroad company would apparently have subjected itself to a great risk if the bonds had been actually issued without the consent of the Commission.

The facts which are not controverted may briefly be restated as follows:

The railroad company found it necessary to issue its bonds in order to carry on its business as an interstate carrier. The Public Service Commission insisted that the bonds could not be issued without its consent and that if they were, the rail-

road company and its officials would subject themselves to severe penalties of the law. The railroad company was perfectly willing to pay the fee based on the amount of its property which could properly be allocated to the state of Missouri. In the existing state of the law it could not hope to market its bonds without the consent of the Missouri commission. It therefore obtained an order of the Commission authorizing the bonds to be issued, and at the same time protested against the amount of the fee, and raised a direct issue with the Commission as to its legality. It had the right to assume under the decisions of this court, and of the Supreme Court of Missouri that the fee would be divided as was done by the Circuit Court of Cole county. It submits that it was acting in the utmost good faith in seeking to protect its rights as an interstate carrier, and at the same time procuring a ruling upon the application of the Missouri law. The Public Service Commission of Missouri had no right, under the federal constitution to place itself in a position where its asserted jurisdiction would cast a cloud upon the title of the bonds of plaintiff in error and make it impossible for the railroad company to remove that cloud without the payment of an illegal fee. The railroad company was under duress. It was compelled to obtain the consent of the Commission and pay the fee demanded under protest, or (a) submit to a condition which would make it impossible to sell its bonds, or (b) run the risk of incurring heavy penalties. This we submit was a burden upon interstate commerce, and entitles plaintiff in error to the relief prayed for.

Respectfully submitted,

HENRY W. CLARK AND
N. H. LOOMIS,
Attorneys for Plaintiff in Error.

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JAMES D. MA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

UNION PACIFIC RAILWAY COMPANY, *Plaintiff-in-Error*,
vs.
PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, *Defendant-in-Error*.

No. 65.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF OF DEFENDANT-IN-ERROR.

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HUGH STEPHENS JEFFERSON CITY

IN THE

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UNION PACIFIC RAILWAY COMPANY, *Plaintiff-in-Error,*
vs.
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No. 65.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Brief of Defendant-in-Error.

STATEMENT OF FACTS.

The statement of facts presented in the brief of plaintiff-in-error is accepted as correct except in the following particulars:

Defendant in error states that the controversy involved in this appeal is not "whether under the facts stated, a fee of $10,962.25 based upon a rate applied to the entire issue of bonds, representing the company's

total mileage as an interstate carrier, and necessary for the making of betterments on its property as a whole, is reasonable and lawful and can be sustained under the commerce clause of the Federal Constitution, or the Fourteenth Amendment," (page 8, brief of plaintiff-in-error), but the question at issue is whether the railroad company, having voluntarily applied to the Missouri Public Service Commission for a certificate authorizing the issuance of bonds in question, and having received and expressly accepted such certificate, was estopped to deny its authority or to question the fee fixed by statute.

The action of the Public Service Commission challenged by the railroad company and subsequently reviewed by the Cole County Circuit Court and the Supreme Court of Missouri, was not the making of the order of the Commission approving the issuance of bonds by the railroad company. This order, by formal written statement filed before the Public Service Commission, the railroad company accepted and agreed to obey. (Page 33, Transcript of Record.)

The protest of the railroad company was not directed at the action of the Commission in entering this order approving the issuance of bonds, but was specifically directed at the action of the Commission in assessing and fixing the fees to be charged for the issuance of said order or certificate. (Page 34, Transcript of Record.)

The Commission, in so assessing and fixing such fees, did not enter a formal order, but notified the railroad company through a communication by its Secretary, that the amount of fees due to the State of Missouri for the order or certificate issued, was $10,962.25.

The motion for rehearing filed before the Public

Service Commission by the railroad company merely asked for a rehearing of the assessment of fees made by the Public Service Commission, as above stated. (Pages 34-37, Transcript of Record.)

Nothing in the record supports the statement of plaintiff-in-error that the Public Service Commission demanded or insisted that the Railroad Company submit its proposed bond issue to the Commission for approval. The record shows that the proceeding was instituted by the filing of an application before the Commission, the prayer of which specifically asked that the Commission authorize and approve the issuance of the entire bond issue of $31,848,900. (Page 8, Transcript.)

The penalties prescribed for issuing bonds without the consent of the Commission, are found in subdivision 4 of Section 58, page 596, Missouri Session Laws of 1913, as stated by plaintiff in error, but these penalties do not apply under the provisions of the law during the time any party is actually and in good faith prosecuting a suit for the judicial review of the action of the Commission complained of.

Section 106, page 638, Missouri Session Laws, 1913, is as follows:

> "Sec. 106. Actions to recover penalties or forfeitures.—An action to recover a penalty or a forfeiture under this act or to enforce the powers of the commission under this or any other act may be brought in any circuit court in this state in the name of the state of Missouri and shall be commenced and prosecuted to final judgment by the general counsel to the commission. In any such action all penalties and forfeitures incurred up to the time of

commencing the same may be sued for and recovered therein, and the commencement of an action to recover a penalty or forfeiture shall not be, or be held to be a waiver of the right to recover any other penalty or forfeiture; *if the defendant in such action shall prove that during any portion of the time for which it is sought to recover penalties or forfeitures for a violation of an order or decision of the commission, the defendant was actually and in good faith prosecuting a suit to review such order or decision in the manner as provided in this act, the court shall remit the penalties or forfeitures incurred during the pendency of such proceeding.* All moneys recovered as a penalty or forfeiture shall be paid to the public school fund of the state. Any such action may be compromised or discontinued on application of the commission upon such terms as the court shall approve and order."

BRIEF OF THE ARGUMENT.

This court has no jurisdiction because the alleged Federal question did not control nor even affect the decision of the state court. This court has repeatedly ruled that where a state court has decided against the plaintiff in error on a matter of general law broad enough to sustain the judgment, this court will not consider the Federal questions, even in cases where the state court actually considered and decided such questions adversely to plaintiff in error's contention.

The decision of the Supreme Court of Missouri is particularly and expressly based upon the principle of estoppel. It held that the Railroad Company, having voluntarily invoked the beneficial provisions of the Public Service Commission Act, and having secured the approval of an issue of bonds, should not thereafter be heard to deny the existence of the power which it thus invoked for the sole purpose of avoiding the payment of the fee fixed by the Legislature for the services of the Commission in approving said bonds.

In stating the question to be decided, the court said:

> "The respondent Railroad Company has furnished us with an elaborate argument as to the power of the Public Service Commission, under the terms of the statute which created it, to take cognizance of the issue of these bonds, and also upon the power of the General Assembly to confer such jurisdiction, as affected by certain provisions of the Federal Constitution relating to interstate commerce

and the property rights guaranteed by the first section of the fourteenth amendment to that instrument. However interesting these questions may be we must not lose sight of the nature and scope of the proceeding in which they are presented."

(Page 44, Transcript of the Record.)

Continuing, the court stated that the Railroad Company instituted the proceeding before the Commission by filing a petition asking authority for the issuance of the bonds; that such petition in no way questioned the constitutionality of the Public Service Commission Law therein invoked; that the Railroad Company obtained and accepted the order authorizing the issuance of bonds, and made no demand to have it modified in respect of the authority it granted, "but while retaining its benefits, denies its liability to pay the amount which the Act prescribes as compensation to the State for the issuance of the certificate;" that its motion for rehearing before the Commission was confined solely to the assessment of the fee.

For these reasons, the court said the only question to be decided was whether the Railroad Company could lawfully be required to pay the fee of $10,962.25, or as stated in the emphatic language of the court, "The respondent has elected without protest to submit itself to the jurisdiction of the Commission, and is satisfied with the judgment of the Circuit Court. It desires to obtain the endorsement of the appellant Commission as cheaply as it can, and the price is the only thing with which we have to deal."

Further, the court, after having disposed of the objection to the fee as being unreasonable, said:

> "We have already held that the respondent, having without protest, or question, availed itself of the privileges and immunities incident to compliance with the Public Service Act at the expense of the state, cannot now deny the existence of the power which it invoked, for the sole purpose of avoiding the payment of the fee fixed by the legislature for the same services before it requested their performance."
>
> (Page 46, Transcript of the Record.)

Thus it appears that the State court did not consider it necessary to decide, and did not decide the Federal question set up in the specification of errors, assigned by plaintiff-in-error.

The second specification of error does not state a Federal question, but simply alleges that the State court erroneously decided the case upon the theory that the Railroad Company voluntarily invoked the power of the Commission.

In the case of *Gaar, Scott & Company vs. Shannon*, 223 *U. S.* 468, this court announced a rule which we believe to be squarely applicable here. In that case this court held that the decision of the State court dismissing a suit by a foreign corporation to recover back a franchise tax under a State law, alleged to contravene the Federal Constitution, resting in part on the ground that the tax was voluntarily paid, would not be reviewed in this court. In its opinion, the court thus stated the familiar rule:

> "If the record affords a basis for sustaining the last proposition, this court cannot consider whether the act violates the Fourteenth Amendment, or the commerce and contract

clauses of the Constitution. For, as repeatedly ruled, where a state court has decided against the plaintiff-in-error on a matter of general law broad enough to sustain the judgment, this court will not consider the Federal questions, even though they may have been actually considered and determined adversely to his contention. *Hale v. Akers*, 132 *U. S.* 554, 564. The principle has been enforced in cases where the ruling of the state court was based on the application of the doctrine of *res adjudicata*, laches, statute of limitations, and others similar in kind to that involving the effect of a voluntary payment."

(Page 470, 223 U. S.)

In *Northern Pacific R. R. Co. vs. Ellis*, 244 *U. S.* 458, this court held that the judgment of the State court, resting upon the doctrine of *res adjudicata*, an independent ground not involving a Federal question, was not subject to review here.

In *Moran vs. Horsky*, 178 *U. S.* 205, this court held that the defense of *laches* which was sustained by the State court was in that case in its nature a defense conceding the existence, under the laws of the United States of a prior right, but because of the delay in its assertion, its recognition was prevented; that the decision was based upon an independent question, one broad enough to sustain this judgment, and no Federal question was before this court for review. Other cases of the same nature, asserting lack of jurisdiction, because the State decision rested upon the application of the doctrine of estoppel, *laches*, waiver of constitutional rights, voluntary payment, statute of limitations and other similar principles of general law, are—

Pierce vs. Somerset Railway, 171 U. S. 641;
Hale vs. Lewis, 181 U. S. 473;
Henderson Bridge Company vs. Henderson City, 141 U. S. 679;
Jenkins vs. Lowenthal, 110 U. S. 222;
Cuyahoga Power Co. vs. Northern Realty Co., 244 U. S., 300.

It may be conceded that it is equally well settled that if the Federal question is properly presented and necessarily controls the determination of the case, the appellate jurisdiction of this court will not be defeated because the decision is put upon some proposition of local law. The cases of *C. B. & Q. Railway vs. Drainage Commissioners*, 200 *U. S.* 561, and *West Chicago Railroad vs. Chicago*, 201 *U. S.* 506, are typical of the decisions sustaining this view. But these cases stand on the proposition that the claim of a Federal right or immunity set up from the outset, went to the very root of the case, and dominated every part of it, and the decision of the State court on some ground of local law, *was in effect a failure to recognize such Federal right or immunity.* These cases are stated to be exceptions to the general rule, and it is clearly pointed out that the decisions of the State court, under the view therein, rest upon a principle of local law *not broad enough or sufficient in itself to cover the essential issues and control the rights of the parties.*

It is clear, from an examination of this record, that the question as to the estoppel of the Railroad Company to deny the existence of the power of the Commission which it invoked, fairly rests on the record, and was not arbitrarily injected into this case.

Certain decisions of this court go further and hold that where the State court has sustained the defense of

estoppel on account of *laches* and acquiescence, not a Federal question, this court will not inquire into the soundness of the state court's decision.

Pierce vs. Somerset Railway, 171 U. S. 641.
Eustis vs. Bowles, 150 U. S. 361.

In the latter case the State court held that by accepting a dividend under insolvency proceedings, Eustis waived his legal right to claim that the discharge obtained under subsequent laws impaired the obligation of a contract. *This court held that whether that view of the case was sound or not, it was not a Federal question, and therefore, not within the province of this court to inquire about.*

In the case of Pierce vs. Somerset Railway, *supra*, the decision in the Eustis case was followed, and that portion of the opinion holding that it was not the duty of this court to inquire into the soundness of the state decision of a non-Federal question, was quoted and approved.

Further, it was said:

> "A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action, is not a Federal one."

Defendant in error has not filed a motion to dismiss the writ herein. However, this court has heretofore, when the question of jurisdiction arising from the alleged want of a Federal question was raised and discussed in the briefs of counsel, considered and decided

the same without motion. Hale vs. Lewis, 181 U. S. 473, 477.

The record evidence supports the finding of the State court that plaintiff in error voluntarily elected to invoke the powers of the Public Service Commission.

The facts before the state court afford ample basis for its holding that the general principle of law, termed estoppel, was applicable to the case.

(a) The intitial step in the proceeding was the filing by the Railroad Company of its petition before the Commission, praying that the Commission approve its entire bond issue of $31,848,900.

(b) This application, while lengthy and elaborate, contained not a syllable of objection to the right of the Public Service Commission to authorize its proposed issue of bonds.

(c) The Railroad Company, by formal written acceptance of its President, agreed to obey the terms of the order of the Commission authorizing the bond issue.

(d) The protest of payment of the fee, filed by the Railroad Company with the Commission, after receipt and acceptance of its order, in no way questioned the power of the Commission to authorize the issuance of bonds. In fact, it expressly stated that the payment under protest was made to prevent revocation of the certificate of authorization.

(e) The hearing and investigation before the Public Service Commission, resulted in the certification by the State that the bonds in question were issued for the pur-

> pose of reimbursing the Railroad Company for expenditures from earnings for betterments, and were therefore for a legitimate and proper purpose.

Upon this showing, the State court had ample reason for its conclusion that the Railroad Company desired the certificate of the Public Service Commission "to give value to the securities by such evidence of their validity and security as the inquiry and action might afford."

There is no foundation in fact for the contention that the Railroad Company's invocation of the statutory powers of the Commission was under duress and compulsion.

The penalties and forfeitures provided for by the Public Service Commission for violation of the Public Service Commission Law or the orders of the Commission do not apply during any of the time a defendant corporation is in good faith prosecuting a judicial review proceeding to test the power of the Commission.

Section 106 of the Public Service Commission Act, quoted in full in the statement of this brief, bars the imposition of the statutory fines and penalties for violation of the provisions of the Public Service Commission Law, or of Commission orders during the pendency of review proceedings instituted in good faith.

If the plaintiff in error had actually and in good faith desired to test the validity of the provisions of the Public Service Commission Law, relative to the authorization of bond issues of foreign railroad corporations, ample opportunity was afforded by the provisions of the Public Service Commission Law for the full judicial review of any order of the Commission, and for determination of its lawfulness and reasonableness. Section

106, Public Service Commission Act, *supra*, barred the recovery of penalties or forfeitures which might otherwise have been incurred during the pendency of such proceedings.

Therefore, plaintiff in error could have asserted from the outset that the Public Service Commission possessed no power to regulate the issuance of its securities and could have refused to accept the order prescribing the amount and the manner of issuance of its bonds, and by prosecution of a proceeding to review that order, its lawfulness could have been ascertained, the Railroad Company incurring no liability to penalties or forfeitures for non-observance thereof.

Or, plaintiff in error could have disregarded the apparent authority of the Commission, and announced its intention to issue bonds, without submitting an application for approval thereof, whereupon the validity of the Public Service Commission Law could have been tested in an injunction suit brought by the Commission.

In fact, this course was subsequently followed by the Railroad Company, and an injunction suit was brought by the Commission in the Circuit Court of Jackson County, Missouri, as stated in the brief of plaintiff in error, at page 8.

The alleged grounds of duress and compulsion set up here did not deter the plaintiff in error from taking steps to issue bonds without the consent of the Commission in that case.

The whole record in this case conclusively shows that the plaintiff in error desired the certificate of the Commission, if same could be obtained without the payment of compensation to the State for the issuance thereof.

CONCLUSION.

It is respectfully urged that no question is here presented for the decision of this court. In holding that the Railroad Company so acted as to be estopped from asserting the invalidity of the Public Service Commission Law and the action of the Public Service Commission thereunder, the Supreme Court of Missouri decided no Federal question. It cannot be maintained that the Federal question set up in the specification of errors was passed upon by the State court, either by express decision, or by the necessary effect of the decision operating as a denial of constitutional right.

The record affords ample basis for sustaining the decision of the State court upon the principle of estoppel.

Wherefore, defendant in error submits that the writ of error should be dismissed or the judgment of the Supreme Court of Missouri should be affirmed.

Respectfully submitted,

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